# TRANSCRIPT OF RECORD

## Supreme Court of the United States

**OCTOBER TERM, 1962**

## No. 67

F. L. SHUTTLESWORTH, ET AL., PETITIONERS,

*vs.*

CITY OF BIRMINGHAM.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF ALABAMA

PETITION FOR CERTIORARI FILED FEBRUARY 14, 1962
CERTIORARI GRANTED JUNE 25, 1962

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[fol. 1] [File endorsement omitted]

**IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT OF ALABAMA, IN AND FOR JEFFERSON COUNTY**

No. 20789

CITY OF BIRMINGHAM,

vs.

F. L. SHUTTLESWORTH.

APPEAL BOND—Filed May 4, 1960

The State of Alabama )
) City of Birmingham
Jefferson County )

We, Rev. F. L. Shuttlesworth, principal and Jas Esdale sureties, acknowledge ourselves indebted to the City of Birmingham, a municipal corporation, in the sum of Three Hundred and no/100 Dollars, for the payment of which, well and truly to be made, we bind ourselves, our adminisrators, and executors. But the condition of the above obligation is such, that whereas the above bounden principal was tried and convicted on the charge of Count 1. Aiding and Abetting Sec 824 GCC and has prayed and obtained an appeal to the Circuit Court of Jefferson County, Alabama, from the judgment of the Recorder's Court of the City of Birmingham, adjudging him to pay a fine of One Hundred Dollars, Costs Five Dollars, and to perform hard labor for 180 days, rendered the 4 day of April 1960.

Now, if the said principal shall appear at present Term of the Circuit Court of Jefferson County, Alabama, and from term to term thereafter until discharged by law, then this obligation to be void, otherwise to remain in full force and effect. And as against this obligation we waive all right under the laws of Alabama to claim any personal property as exempt from levy and sale.

Witness our hand and seals this 4 day of April 1960.

Rev. F. L. Shuttlesworth (L.S.), 3232 28 Ave N., Jas Esdale (L.S.), 809 No 21 st., By Lacey Alexander (L.S.), Atty In fact.

Approved 4 day of April 1960.

William Conway, Recorder of the City of Birmingham.

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[fol. 2] [File endorsement omitted]

IN THE CIRCUIT COURT OF THE

TENTH JUDICIAL CIRCUIT OF ALABAMA

No. 20789

---

CITY OF BIRMINGHAM, a Municipal corporation, Plaintiff,

v.

F. L. SHUTTLESWORTH, Defendant.

---

COMPLAINT—Filed October 11, 1960

Comes the City of Birmingham, Alabama, a municipal corporation, and complains that F. L. Shuttlesworth, within twelve months before the beginning of this prosecution, and within the City of Birmingham or the police jurisdiction thereof, did incite or aid or abet in the violation of an ordinance of the City, to-wit, Section 1436 of the General City Code of Birmingham of 1944, in that F. L. Shuttlesworth did incite or aid or abet another person to go or remain on the premises of another after being warned not to do so, contrary to and in violation of Section 824 of the General City Code of Birmingham of 1944.

Watts E. Davis, Attorney for City of Birmingham.

IN THE CIRCUIT COURT OF THE
TENTH JUDICIAL CIRCUIT OF ALABAMA

No. 20789

CITY OF BIRMINGHAM,

vs.

F. L. SHUTTLESWORTH, Defendant.

MOTION TO STRIKE—Filed October 11, 1960

Comes now F. L. Shuttlesworth, defendant in this cause, and moves to strike the complaint in this cause, and as grounds for said Motion, sets out and assigns the following, separately and severally:

1. That the complaint, affidavit, etc., is not sworn to in this cause.

2. That the allegations of the said complaint are so vague and indefinite, as not to apprise this defendant of what he is called upon to defend.

3. That the ordinances or statutes upon which are founded the complaint in this cause, as applied to this de-
[fol. 3] fendant, as a citizen of the State of Alabama, and of the United States, constitute an abridgment of the freedom of assembly, speech and liberties secured to the Defendant, by the Constitution and laws of the State of Alabama and the Fourteenth Amendment of the Constitution of the United States of America.

4. That the said ordinances or statutes which are the basis for the affidavit, information or complaint in this cause, as applied to the defendant, constitute an abridgment of privileges and immunities guaranteed defendant, as a citizen of the United States, in violation of the Constitution and laws of the State of Alabama, and of the Fourteenth Amendment of the United States Constitution.

5. That Sections 824 and 1436 of the General City Code of the City of Birmingham, as applied to this defendant, a

Negro citizen of the United States, constitute a denial of due process and equal protection of law, in violation of the Fourteenth Amendment to the Constitution of the United States of America.

6. That the said affidavit, information or complaint, does not charge any offense, which is cognizable by this Court.

Arthur D. Shores, Oscar W. Adams, Jr., Orzell Billingsley, Jr., Peter A. Hall, J. Richmond Pearson, Attorneys for Defendant.

[File endorsement omitted]

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IN THE CIRCUIT COURT OF THE
TENTH JUDICIAL CIRCUIT OF ALABAMA
No. 20789

---

CITY OF BIRMINGHAM,

vs.

F. L. SHUTTLESWORTH, Defendant.

---

DEMURRERS—Filed October 11, 1960

Comes now F. L. Shuttlesworth, defendant in this cause, and demurs to the complaint in this cause, and to each and every count thereof, separately and severally, and as grounds for such demurrer sets out and assigns the following, separately and severally:

1. The affidavit or information which supports the complaint in this cause, does not charge defendant with any offense under the Constitution and laws of the State of [fol. 4] Alabama.

2. That the complaint, affidavit or information upon which this cause is based is insufficient to support prosecution of this cause, in that no offense is charged which is cognizable by this Honorable Court.

3. That the allegations of the complaint and each count thereof are so vague and indefinite as not to apprise this defendant of what he is called upon to defend.

4. That the ordinances, Sections 1436 and Sections 824 of the 1944 General City Code of Birmingham, Alabama, as applied to this defendant, are invalid in that they violate Section 4, Article 1, of the Constitution of Alabama, and the First and Fourteenth Amendments to the Constitution of the United States of America.

5. That Sections 1436 and Sections 824 of the 1944 General City Code of Birmingham, Alabama, which support the complaint, affidavit or information in this cause, as applied to this defendant, a citizen of the State of Alabama and of the United States, constitute an abridgment of freedom of speech and assembly violative of rights and liberties secured the defendant by the First and Fourteenth Amendments to the Constitution of the United States of America.

6. That the aforesaid ordinances as applied to defendant, are unconstitutional on their face in that they are so vague as to constitute a deprivation of liberty without due process of law in violation of the provisions of the Fourteenth Amendment to the United States Constitution.

7. That the said Ordinance or Statute in this case, as applied to defendant, constitute an abridgment of privileges and immunities guaranteed defendant as a citizen of the United States, in violation of the Fourteenth Amendment to the United States Constitution.

8. That the said Ordinances, as applied to defendant, constitute a denial of equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States of America.

Arthur D. Shores, J. Richmond Pearson, Orzell Billingsley, Jr., Oscar W. Adams, Jr., Peter A. Hall,
Attorneys for Defendant.

[File endorsement omitted]

[fol. 5]

IN THE CIRCUIT COURT OF THE
TENTH JUDICIAL CIRCUIT OF ALABAMA

No. 20789

CITY OF BIRMINGHAM, Plaintiff,

vs.

REV. F. L. SHUTTLESWORTH, Defendant.

MOTION TO EXCLUDE THE EVIDENCE—Filed October 11, 1960

1. The complaint charging defendant, a Negro, with violation of 824 the General City Code of Birmingham of 1944, to-wit, aiding and abetting in the violation of 1436 of the General City Code of Birmingham of 1944, to-wit, an alleged trespass upon land after being forbidden to enter or remain or after being told to leave is invalid in that the evidence establishes merely that persons alleged to have been aided and abetted by the defendant were peacefully upon the premises of various department stores, an establishment performing an economic function invested with the public interest, as a customer, vsitor, business guest or invitee, and there is no basis for the charge recited by the complaint other than an effort to exclude those persons who were alleged to have been aided and abetted by the defendant from the various eating facilities because of their race or color; defendant, at the same time is being denied his right of freedom of speech and assembly in that he has been criminally prosecuted for an alleged peaceful discourse with other citizens of his race in regards to achieving first class citizenship; thereby depriving him of liberty without due process of law and of the equal protection of the laws secured by the Fourteenth Amendment of the United States Constitution.

2. The evidence offered against defendant, a Negro, in support of the complaint charging him with violation of 824 of the General City Code of Birmingham was wholly in-

competent and hearsay evidence upon the grounds that the testimony offered by the City of Birmingham was based on hearsay and that the witness, Detective Pierce, was not recounting the fact personally known to him. Further, that the testimony of the witness, Detective Pierce, was based upon the record of the proceedings in the Recorders Court and the instant proceedings being a trial de novo said records of the proceedings in the Recorders Court are only admissible for the purpose of impeachment. There being no testimony offered by the defendant, any admission of the records of proceedings in the Recorders Court in this proceedings constitutes a violation of the defendant's constitutional rights under the Laws of the State of Alabama and [fol. 6] under the Laws and Constitution of the United States of America specifically those rights secured by the Fourteenth Amendment of the United States Constitution.

3. That even if the evidence offered by the City of Birmingham was held to be legal it only establishes that the prosecution of the defendant was procured for the purpose of preventing him from engaging in peaceful assembly with others for the purpose of speaking, and; otherwise peacefully protesting in public places the refusal of the preponderant number of stores, facilities and accommodations open to the public in Birmingham, Alabama, to permit the defendant, a Negro, and other members of defendant's race from enjoying the access to such stores, facilities, and accommodations afforded members of other races; and that by this prosecution, prosecuting witnesses and arresting officers are attempting to employ the aid of the Court to enforce a racially discriminatory policy contrary to the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

4. The evidence against the defendant, a Negro, in support of the charge of his violation of 824 the General City Code of Birmingham of 1944, clearly indicates that those persons alleged to have acted as a result of the aiding and abetting of the defendant, had accepted an invitation to enter and purchase articles in the various department stores in the City of Birmingham, stores open to the public, but had not been allowed to obtain food service on the same

basis as that offered white persons, because of their race or color; and, that in furtherance of this racially discriminatory practice of the various department stores in the City of Birmingham, the defendant was arrested, thereby violating defendant's rights under the equal protection and due process clauses of the Fourteenth Amendment of the United States Constitution, to free speech and the right to peaceful assembly.

Oscar W. Adams, Jr., Orzell Billingsley, Jr., Peter A. Hall, Arthur D. Shores, J. Richmond Pearson, Attorneys for Defendant.

[File endorsement omitted]

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[fol. 7]

IN THE CIRCUIT COURT OF THE
TENTH JUDICIAL CIRCUIT OF ALABAMA

Appealed from Recorder's Court
(Aiding & Abetting)

Honorable Geo. Lewis Bailes, Judge Presiding

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CITY OF BIRMINGHAM,

vs.

F. L. SHUTTLESWORTH.

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JUDGMENT ENTRY—October 11, 1960

This the 11th day of October, 1960, came Wm. C. Walker, who prosecutes for the City of Birmingham, and also came the defendant in his own proper person and by attorney, and the City of Birmingham files written Complaint in this cause, and the defendant being duly arraigned upon said Complaint for his plea thereto says that he is not guilty; and defendant files motion to strike, and said motion being considered by the Court, it is ordered and adjudged by the

Court that said motion be and the same is hereby overruled, to which action of the Court in overruling said motion the defendant hereby duly and legally excepts; and the defendant files demurrers, and said demurrers being considered by the Court, it is ordered and adjudged by the Court that said demurrers be and the same are hereby overruled, to which action of the Court in overruling said demurrers the defendant hereby duly and legally excepts; and the defendant files motion to exclude the evidence, and said motion being considered by the Court, it is ordered and adjudged by the Court that said motion be and the same is hereby overruled, to which action of the Court in overruling said motion, the defendant hereby duly and legally excepts; and the Court finds the defendant guilty as charged in the Complaint and thereupon assessed a fine of One Hundred ($100.00) dollars and costs against said defendant. It is therefore considered by the Court, and it is the judgment of the Court that said defendant is guilty as charged in said Complaint, and that he pay a fine of One Hundred ($100.00) dollars and costs of this cause.

And said defendant being now in open Court, and having presently failed to pay the fine of $100.00 and the costs of $5.00 accrued in the Recorder's Court of the City of Birmingham, or to confess judgment with good and sufficient security for the same, it is therefore considered by the Court, and it is ordered and adjudged by the Court, and it is the sentence of the Law, that the defendant, the said F. L. Shuttlesworth, perform hard labor for the City of Birmingham for fifty-two days, because of his failure to pay said fine and costs of $5.00 accrued in said Recorder's Court, or to confess judgment with good and sufficient security therefor.

[fol. 8] It is further considered by the Court, and it is ordered and adjudged by the Court, and it is the sentence of the Law, that the defendant, the said F. L. Shuttlesworth, perform additional hard labor for the City of Birmingham for one hundred eighty days, as additional punishment in this cause.

And the costs legally taxable against the defendant in this cause amounting to forty-seven and 25/100 ($47.25)

dollars, not being presently paid or secured, and $4.00 of said amount being State Trial Tax, $3.00, and Law Library Tax, $1.00, leaving forty-three and 25/100 ($43.25) dollars taxable for sentence, it is ordered by the Court that said defendant perform additional hard labor for the County for fifty-eight days, at the rate of 75¢ per day to pay said costs. It is further ordered by the Court that after the sentence for the City of Birmingham has expired, that the City authorities return the defendant to the County authorities to execute said sentence for costs.

It is further considered by the Court that the State of Alabama have and recover of the said defendant the costs in this behalf expended for feeding the defendant while in jail, for which let execution issue.

And defendant files motion for a new trial in this cause, and said motion coming on to be heard and determined by the Court, it is ordered by the Court, and it is the judgment of the Court that said motion be and the same is hereby overruled.

And notice of appeal being given, and it appearing to the Court that, upon the trial of this cause, certain questions of Law were reserved by the defendant for the consideration of the Court of Appeals of Alabama, it is ordered by the Court that the execution of the sentence in this cause be and the same is hereby suspended until the decision of this cause by said Court of Appeals of Alabama.

It is further ordered by the Court that the Appeal Bond in this cause be and the same is hereby fixed at $300.00, conditioned as required by Law.

[fol. 9]

IN THE CIRCUIT COURT OF THE
TENTH JUDICIAL CIRCUIT OF ALABAMA

No. 20789

---

CITY OF BIRMINGHAM, a Municipal Corporation, Plaintiff,

vs.

F. L. SHUTTLESWORTH, Defendant.

---

MOTION FOR A NEW TRIAL—Filed October 11, 1960

Now comes the defendant, in the above styled cause, and with leave of the Court, first had and obtained, and moves this Honorable Court to set aside the verdict and judgment rendered on to-wit the 11th day of October, 1960, and that this Honorable Court will grant the defendant a new trial, and as grounds for said Motion sets out and assigns the following, separately and severally:

1. That the Judgment of the Court in said case, is contrary to the law.

2. For that the Judgment of the Court is contrary to the facts.

3. For that the judgment of the Court is contrary to the law in the case.

4. In that the judgment of the Court is not sustained by the great preponderance of the evidence in the case.

5. For that the Judgment of the Court is not sustained by the great preponderance of the evidence in the case.

6. For that the Judgment of the Court is so unfair, as to constitute a gross miscarriage of justice.

7. For that the sentence is excessive.

8. For that the Court erred in over-ruling objections, by the defendant to the introduction of evidence on behalf of the City of Birmingham, Alabama, in this case.

9. For the Court erred in overruling objections by the defendant to the introduction of evidence, which was so biased and prejudiced that the defendant was denied the right of a fair and impartial trial.

10. For the Court erred in overruling objections by the defendant to the introduction of evidence, which was so biased and prejudiced that the defendant was denied the right of a fair and impartial trial.

11. The Court erred in overruling defendant's demurrers filed in this cause.

12. The Court erred in overruling the defendant's Motion to Strike the Complaint in this cause.

[fol. 10] 13. The Court erred in finding the defendant guilty of violating the laws or ordinances of the City of Birmingham, Alabama, in that the laws or ordinances, under which this defendant was charged and convicted, and as applied to this defendant, constituted an abridgement of freedom of speech violative of rights and liberties secured to the defendant by the First and Fourteenth Amendments to the Constitution of the United States of America.

14. That the Court erred in refusing to find that the ordinance under which this defendant was being tried, as applied to this defendant, constituted a denial of the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States of America.

15. That the Court erred in finding the defendant guilty of violating the laws or ordinances of the City of Birmingham, Alabama, in that the laws or ordinances under which this defendant was charged and convicted, and as applied to this defendant, constituted a deprivation of liberty, without due process of law, in violation of the Constitution of the State of Alabama, and the provisions of the Fourteenth Amendment to the United States Constitution.

16. The Court erred in overruling defendant's Motion to exclude the evidence in this case.

17. That it appeared from the evidence that no owner of the premises involved, had caused the arrest and prosecution of the defendant, but that such arrest was procured by the officials of the City of Birmingham, Alabama, without first having a complaint from such owner, or other person in charge of such premises.

18. For that it appears from the evidence that the defendant was not prosecuted by the owner of private property, as provided for by the pertinent laws or ordinances of the City of Birmingham, but by police officials.

19. For that it appears from the evidence affirmatively that no owner or other person in charge of the premises involved, or otherwise, having authority to do so, procured the arrest of the defendant or signed a complaint or swore out a warrant against defendant for trespass on private property.

20. For that it affirmatively appears that the defendant was not requested to leave the premises of the store involved, but was only told to go elsewhere in the store.

[fol. 11] Arthur D. Shores, Orzell Billingsley, Jr., Peter A. Hall, J. Richmond Pearson, Oscar W. Adams, Jr., Attorneys for defendant.

ORDER OVERRULING

The foregoing Motion being presented in open court, this 11th day of October, 1960; the same being considered and understood, the Court is of the opinion that the same should be overruled.

Geo. Lewis Bailes, Circuit Judge.

[File endorsement omitted]

IN THE CIRCUIT COURT OF THE
TENTH JUDICIAL CIRCUIT OF ALABAMA

APPEAL BOND TO COURT OF APPEALS—Filed October 11, 1960

The State of Alabama )
Jefferson County )

Know All Men by These Presents, That we Rev. F. L. Shuttlesworth principal, and James Esdale & Willie Esdale as sureties, are held and firmly bound unto the State of Alabama in the sum of Three Hundred Dollars, for the payment of which well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents; and we and each of us waive our rights of exemption under the Constitution and laws of the State of Alabama as against this boad.

The Condition of the Above Obligation is Such, That whereas, the above bounden Rev. F. L. Shuttlesworth was on the day of Oct. 11 1960 convicted in the Circuit Court of Jefferson County, Alabama, for the offense of A & Abetting and had assessed against him a fine of One Hundred and 180 days, together with the cost of this prosecution, and on the 11 day of October, 1960, on failure to pay fine was sentenced to perform hard labor for the County for ..... days, and an additional term for the cost, at the rate of seventy-five cents per day, and as additional punishment imposed the defendant was sentenced to perform hard labor for the County for 180 from which sentence the said Rev. F. L. Shuttlesworth has this day prayed and obtained an appeal to the Court of Appeals of Alabama.

Now, if the Said Rev. F. L. Shuttlesworth shall appear and abide such judgment as may be rendered by the Court of Appeals, and if the judgment of conviction is affirmed, or the appeal is dismissed, the said Rev. F. L. Shuttlesworth shall surrender himself to the Sheriff of Jefferson [fol. 12] County, at the County Jail, within fifteen days from the date of such affirmation or dismissal, then this obligation to be null and void, otherwise to remain in full force and effect.

Given under our hands and seals, this the 11 day of Oct., 1960.

Rev. F. L. Shuttlesworth (L.S.), James Esdale (L.S.), Willie Esdale (L.S.), By A. E. Brooks, Atty. (L.S.)

Approved: Julian Swift, Clerk of the Circuit Court of Jefferson County.

[File endorsement omitted]

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[fol. 13]

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT OF ALABAMA—CRIMINAL DIVISION

Case No. 20789

---

CITY OF BIRMINGHAM, Plaintiff,

vs.

F. L. SHUTTLESWORTH, Defendant.

---

## Transcript of Evidence—October 11, 1960

### *Caption*

The Above-Styled Cause came on to be heard before the Hon. George Lewis Bailes, Judge, without a jury, at 10:00 a.m. on the 11th day of October, 1960, when the following proceedings and testimony was heard:

### APPEARANCES

Messrs. Watts E. Davis and Bill Walker, Attorneys at Law, Birmingham, Alabama, for the City of Birmingham.

Messrs. Arthur D. Shores, Orzell Billingsley, Peter A. Hall, Oscar Adams and J. Richmond Pearson, Attorneys at Law, Birmingham, Alabama, for the defendant.

Reported by Jimmie Crumley.

Mr. Davis: If Your Honor please, by agreement of counsel we would like, with the Court's permission, to try Charles Billups alone with Rev. F. L. Shuttlesworth on aiding and abetting.

The Court: Whatever you all agree upon.

Mr. Davis: All right.

Mr. Billingsley: Your Honor, on the cases of F. L. Shuttlesworth, 20789 and Charles Billups, 20778, we want to file first Motions to Strike in both cases.

The Court: Motions to Strike the complaint?

Mr. Billingsley: Yes.

[fol. 14] The Court: Are they identical?

Mr. Billingsley: Yes sir, they are identical except for the name.

The Court: Let the Motions to Strike be overruled.

Mr. Billingsley: We take an exception, Your Honor. We also have some demurrers in both cases, Your Honor.

The Court: Let the demurrers be overruled in both cases and an exception noted in each instance.

Mr. Billingsley: I take an exception, if Your Honor please.

The Court: Counsel ready?

Mr. Walker: The City is ready, Your Honor.

Mr. Davis: We would like to have James Gober take the stand.

(Whereupon the witness, James E. Gober was called to the stand and duly sworn.)

Mr. Shores: Your Honor, before any questions are put to this witness we are going to object on the ground that his case is still pending and open and that any questions directed to him with regards to this defendant might tend to incriminate him, and for that reason we object to his testifying.

Mr. Davis: If the Court please, I don't think it is the option of counsel to declare any immunity of this witness. I think it would be entirely up to the witness. I think we are being premature here in that nothing has been asked to tend to incriminate this witness as yet.

Mr. Shores: Your Honor, the further objection is that the case against this witness has not been decided and it may be tending to force the witness to testify against himself in violation of the constitution of the State of Alabama as well as the 14th Amendment to the United States Constitution.

The Court: Well, off the record.

(Off the record.)

Mr. Pearson: If he were not a party to a crime that is alleged, his status would be as he said, he would have to [fol. 15] invoke the statute himself, but since he is a party to a crime that has been alleged and the further question has been invoked, and therefore, the avenues of appeal is still open, and any testimony he gives might be used, if it was later reversed and a new trial ordered, and, so, the option belongs to counsel as well as the defendant.

Mr. Davis: With Your Honor's indulgence, I might denote an authority on this proposition. I refer to the case of City of Mobile versus McCowan Oil Company, 148 Southern, 402. I don't have the Alabama citation, I am sorry to say. In substance, without reading this opinion at length, the Supreme Court of Alabama has stated and has cited a long line of Alabama decisions, as well as Corpus Juris pointed out that the violation of a City Ordinance does not rise to the dignity of a crime as protected by the 5th Amendment to the Constitution of the United States. This is an offense against the City of Birmingham and the Supreme Court has said on many occasions that is not a crime subject to the provision of the 5th Amendment where they might tend to involve themselves. And there are other cases cited in this McCowan Oil Company case I refer to. I think that has been the law of long standing in our state.

Mr. Pearson: I would like to say one thing. Counsel for the City of Birmingham does not say whether the Supreme Court of Alabama was speaking about a trial at city level or a trial at Circuit Court level, which would make a difference. I might concur with him if this trial was down at the City, but he doesn't bring out that point.

Mr. Davis: The offense is still the same, the offense against a City Ordinance that brought a case into this court which was originally in the City which is tried de novo here by their choice.

Mr. Hall: If Your Honor please, even if this was city level and this defendant had been accused of a violation of the City Ordinance, the City could not force him to testify against himself under ordinary circumstances. For all intents and purposes, that is the position the witness finds himself in now. He has been accused and tried for alleged violation of the City Ordinance which, of course, is in Your Honor's bosom at this point. No decision has [fol. 16] been made on it and there is a continuation of the trial so to speak. But what the prosecution is doing at this point is calling the defendant to testify against himself, whether that was in the City or here, and I simply do not believe the Law is such. I don't know, I can't quote pertinent authority, but I don't believe if we were on the city level that a witness could be called to testify against himself. As a matter of fact, on the city level at the time of trial in the City Court no witness was called to testify against himself at that time. They could have been, they weren't.

Mr. Davis: I might make one further observation. That this witness did testify in the earlier proceeding in this same cause, that is, on the lower level before the City Court, and it is my opinion that any immunity he might have had, had this been a crime, would have been waived in the earlier phases of this case. But for the information of counsel, this case, City of Mobile versus McCowan Oil Company, is an appeal from the Equity Court in the Mobile Division. I don't think there is any merit in the argument that that only applies in the City Recorder's Court, this is a case that came out of the Equity Division of the Mobile Circuit Court.

I still urge the further point that the witness has not claimed it and I don't think counsel can claim it for this witness.

The Court: I think the counsel is the alter ego of a defendant probably.

Mr. Davis: For all intents and purposes it hasn't been shown in the record that these Counsel represent this boy in the Shuttlesworth case. I understand they represent him in a sit-in case, but this is not a sit-in case we are trying now. This is the Shuttlesworth and Billups case we are trying.

Mr. Pearson: We represent him in anything that grows out of the conduct of which this came out of. The case is still pending and any evidence he gives now might later be used against him, although it might be limited to impeachment, it certainly could be used against him.

[fol. 17] The Court: Well, I will give him the benefit of it and excuse him. You may be excused.

Mr. Davis: I would like to reserve an exception to the Court's ruling.

(Witness excused.)

Mr. Davis: Call James Albert Davis.

(Whereupon James Albert Davis was called to the witness stand and sworn.)

Mr. Shores: Your Honor, we want to offer the very same objection. He is in the same position as the former witness.

The Court: I didn't remember your name.

The Witness: James Albert Davis.

The Court: Assuming the rule applies either positively or negatively, would it apply the same way to James Albert Davis as to James Gober?

Mr. Davis: I can't see any distinction.

The Court: All right. You may be excused.

Mr. Davis: We reserve an exception.

(Witness excused.)

CHARLES L. PIERCE, called as a witness, being first duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Davis:

Q. Will you please state your full name to the Court.
A. C. L. Pierce.
Q. By whom are you employed, Mr. Pierce?
A. City of Birmingham.
Q. And in what capacity?
A. Detective.
Q. Were you so employed on March 30th and 31st of 1960?
A. Yes sir.
Q. Were you so employed on April 1, 1960?
A. Yes sir.
Q. Mr. Pierce, were you present in the City's Recorder's Court, the Honorable William Conway presiding, on the evening of April 1, 1960 at which time Rev. F. L. Shuttles- [fol. 18] worth, or F. L. Shuttlesworth, was on trial for violation of a City Ordinance?
A. Yes sir, I was there.
Q. On that occasion did a James Gober make any statement under oath and in the presence of the defendant Shuttlesworth, in the presence and hearing of the defendant Shuttlesworth, and in the presence and hearing of his counsel on that occasion?
A. Yes sir, he did.
Q. Did he make any statements with reference to someone picking him up or riding him in their automobile from one place to another place on that occasion?

Mr. Hall: If Your Honor please, we object to the question and any answer to the question, anything which occurred in the trial below was taken down by a proper Court Reporter, we assume, and if counsel is referring to happenings there and wants to put sections in here, then he should bring such Reporter here and establish the fact that he did take it down. Detective Pierce has not been

qualified as a Reporter. His interest is adverse to that of this defendant. He is an employee of the City of Birmingham and one of the prosecutors of this action. I assume Detective Pierce initiated the first affidavit and complaint in this cause. He is an Investigating Officer.

If Counsel wants to establish what happened in the Court below, his avenues is open to him. He is an Officer of the City of Birmingham and he has a transcript and the Court Reporter is available to him. We object to Detective Pierce, any answer he gives would be purely hearsay, irrelevant and immaterial and incompetent.

Mr. Davis: Does You Honor care to hear from the City on this point? Number one, of course, these recordings of these proceedings were recorded by recording machine rather than by shorthand in the Recorder's Court. We are talking about simply here about the hearsay proposition, and the proposition comes up as to whether this is an exception to the hearsay rule. We submit it was an exception. It was made in the presence of the defendant and [fol. 19] under oath and the right of cross examination was present and Counsel were present and every item of the defensive elements to except this testimony from the hearsay rule occurs, and we submit that it is admissible. Of course, it is hearsay, but it falls definitely within the exception to the rule prohibiting hearsay testimony.

Mr. Shores: Your Honor, the best evidence would come from these witnesses they attempted to place on the stand, the witnesses who testified there was a chance of incriminating himself, and they are attempting to do indirectly what they can't do directly. This could be used only for impeachment purposes and the exception to the hearsay rule could not apply in this instance.

Mr. Davis: This rule would apply where the testimony of the witness was available. They have seen fit to avail themselves of an immunity or cloak to keep the witnesses themselves who made the statements from testifying, and in that situation I submit this testimony would be an exception to that evidence in the hearsay rule.

Mr. Hall: The only possibility of evading the hearsay rule would be for impeachment purposes. There is no testimony before this Court upon this witness is called upon to

impeach. He can't testify directly within that exception. If Counsel wants to establish what occurred in the Court below, he knows how to do it. He can't evade the long established rule of evidence. The Court Reporter himself probably could do it, but certainly he couldn't do it with a biased Police Officer or any other witness who may have been sitting in the Court Room down there. It would not come within the exception to the hearsay rule.

Mr. Davis: I might add that this question of bias and of Mr. Pierce's interest in this matter would be—

The Court: No, I don't think that would have any weight.

Mr. Davis: The hearsay rule applies where a written document is evidence of the transaction between the parties, but statements under oath where the defendant was present would clearly come within the exception of the hearsay rule.

Mr. Hall: These witnesses cannot testify because of incrimination, it cannot be done by indirection of what they testified to. Another man can't come in and testify [fol. 20] as to what they may have said. This is purely hearsay and not within the exception to hearsay rule. If the City has a case against this defendant, they should establish it by clear proof, clear proof and clear testimony, and direct testimony, not by indirection, not by an escape mechanism from the hearsay rule. This is a violation to allow this witness to testify and there is no exception which would cover it.

The Court: I will sustain the objection to the question whether officer Pierce heard James Gober make a statement.

Mr. Davis: If I might prolong this thing one moment further and make this remark, with the Court's indulgence. The reason for the hearsay rule of evidence, number one, the person does not have the right to cross examine. Number two, the person making the statement was not under oath. And those two elements are certainly present here. The witness was under oath when he made the statement. He was in the presence of this defendant when he made the statement. This defendant had the right to cross examine him when he made the statement. Every element that makes

the hearsay rule objectionable has been eliminated by the factors that existed at the time these boys made this statement, and I submit every element that makes hearsay objectionable has been met and we would like to reserve an exception if that is still the Court's ruling.

The Court: Isn't there one other thing, that the person whose interest was adversely affected by the statement affirmed or denied or remained silent? Is that one of them?

Mr. Davis: He had the opportunity to be heard. He may not have remained silent, that hasn't been put forth.

The Court: Will there be evidence about whether the defendant upon the statement of Gober being made remained silent or denied it?

Mr. Davis: There will be some statements.

The Court: All right. You may ask him.

Mr. Hall: We are going to take exception to that ruling [fol. 21] allowing this testimony in upon the grounds it is a violation of this defendant's rights under the Laws of the Constitution of our State and under the 14th Amendment of the Constitution of the United States.

Q. Mr. Pierce, I will ask you if James Gober on the occasion we just talked about in the presence and hearing of this defendant and under oath made the remark of—I will ask you did he make any remark as to where he went on the evening of March 30, 1960?

Mr. Hall: If Your Honor please, we object to the method of questioning this witness on direct examination. It is leading. He is putting words in the witness' mouth. He is making this case. If he wants the witness to testify, he should phrase his questions differently.

The Court: May I inquire whether the witness heard James Gober in the presence of defendant Shuttlesworth say anything about where he had been the afternoon before or two days before, whether it was the 30th or 31st or the 1st of April?

Mr. Hall: We would object to that question and the answer thereto on the grounds that an answer is irrelevant and immaterial and on further grounds the witness is incompetent to testify.

The Court: The Court thinks it would be well to let him answer that.

Mr. Hall: We want an exception to His Honor's ruling.

Mr. Davis: You may answer.

A. What was the question?

The Court: Read it, please, Mr. Reporter.

(Question read)

A. I heard him testify that he was a student at Daniel Payne College.

Mr. Hall: If Your Honor please, we object. That is not a responsive answer as to whether he heard anything about where he had gone the day before.

The Court: I would leave that out.

Mr. Hall: We object to any voluntary statement not responsive to the question and we reserve an exception.

A. In response to questions by City Attorney Breckenridge, he stated—

Mr. Billingsley: We interpose an objection.

[fol. 22] The Court: No, I mean at the same time and place and in the presence of the defendant.

Mr. Billingsley: This is what we have in this situation. We have the City Attorney using the Court Reporter's record from which he is questioning Mr. Pierce. Whether or not Mr. Pierce was present all during the trial I do not know, but it has to do with the trial which took place down in the City Hall, and this is a trial de novo. Now, except for impeachment purposes, the record should not be used in the trial of this case. Now, the City has—we seek direct testimony as to this whole charge of aiding and abetting which relates to the ordinance which we have here. It seems to me if it could be done, the best person to use, as far as the transcript of evidence is concerned, would be the Court Reporter. The Court Reporter as such, I don't believe, would give this testimony, but we are not using the testimony. We are using Mr. Pierce to testify what is in that record there, and I question whether or not that record is accurate because it was taken off a machine and

it has not been established that this witness is competent in order to find this defendant guilty of the ordinance he is charged with violating. Then we come in with James Gober. James Gober is not before this Court. We are trying Rev. Shuttlesworth. Does this come in the form of a confession or how does it come? An admission against interest or whatever it is? If it is a confession, then Rev. Shuttlesworth did not make it. If it is an admission against interest, Rev. Shuttlesworth did not make it. But I fail to understand how a transcript of evidence in the Recorder's Court can be used with Mr. Pierce acting as the witness to make a case for the City. The best way I could see to do it would be to have the Court Reporter to testify as to what is in that transcript. I just fail to see how he can establish that.

The Court: The question was not based upon the transcript. The question was based upon the fact vel non of the presence of this witness at that time and place hearing a statement or statements in the presence of the defendant on trial today. That is the basis on which the question is [fol. 23] propounded.

Mr. Hall: If Your Honor please, before he answers that, assuming that he is going to testify with reference to some confession or some admission against interest by a man whom Your Honor has decided would not have to testify against himself, now, if this witness is going to establish testimony which the man cannot be made to give, then certainly he is in a peculiar light. And if it is a confession or admission against interest, before we testify we should be allowed to inquire into his knowledge whether or not he has familiarized himself with this transcript, if he read it or if he has an independent recollection.

The Court: Could we predemit the transcript and get it out of our minds?

Mr. Hall: No sir. It is right in our face in front of the City Attorney. He was looking at it and reading from it.

The Court: Well, the Court isn't.

Mr. Hall: But we know that question that the City Attorney direct to the witness which Your Honor did not allow came from the transcript and was based on the transcript. So, if the City Attorney would dispose of the record

and get it out of our view then perhaps we could forget it, but since he is looking at it and consulting it and since Mr. Pierce was sitting at the table by him I suppose he has looked at it. I would like to question him as to whether he read the record and decided that is what happened, since they have had it and we haven't had it.

The Court: You desire to make some inquiries on voir dire?

Mr. Hall: Would Your Honor rule that I could?

The Court: Yes.

Mr. Hall: Mr. Pierce, have you seen the transcript of the record in this case?

A. I have.

Mr. Hall: Have you read it?

A. I read it this morning.

Q. This morning was the first time you read it?

A. I think it was.

Q. You don't recall having read it before?

[fol. 24] A. No, I don't.

Mr. Hall: Have you gone over this case with Mr. Davis, the attorney for the City?

A. No.

Q. Have you all discussed this matter?

A. Not in detail, no sir.

Q. You haven't told him anything about what James Gober said or testified to?

A. No, I haven't.

Q. He doesn't know what you are going to say?

A. I read the transcript. He asked me if I wanted to read the transcript and I read the transcript.

Mr. Hall: You read the transcript this morning?

A. That's right.

Mr. Hall: And you did sit in with the City Attorney at the counsel table this morning, did you not?

A. I was at the table, yes.

Mr. Hall: We agreed to let you sit in and you did sit in with Mr. Davis and you have been consulting with him?

A. I don't know about any agreement. I did sit here.

Mr. Hall: Well, we did stipulate you could sit in and you did sit in at counsel table?

A. That's right.

Mr. Hall: Your Honor, we object to any answer this witness may make as not being of his own information, but having come from the record and having come from the City Attorney.

Mr. Davis: That hasn't been established yet, that it came from this record. I think cross examination would be the proper place to establish that, if that be the case.

The Court: Let him answer.

Mr. Hall: If Your Honor please, we except.

Mr. Davis: Can we go back to the question, Mr. Reporter, and read it to the witness, please.

(Whereupon the last question propounded by Mr. Davis was read.)

[fol. 25] A. He did.

Mr. Hall: If Your Honor please, he is answering Your Honor's question rather than Mr. Davis' question.

The Witness: Could I ask Your Honor, does Your Honor want me to testify as to what happened in Recorder's Court or in so far as I know, my recollection, or does Your Honor want me to answer questions one at a time? I am a little confused.

The Court: It might keep it more direct and clear if you took one question at a time.

A. All right.

Q. I believe you said, yes, he did say where he went or that he had been someplace on March 30th. Is that your answer in substance?

A. Yes.

Q. Did he say where that place was on March 30th he went?

A. He said he went to Rev. Shuttlesworth's house.

Q. Did he make any remarks as to who was present when he arrived at Rev. Shuttlesworth's house?

A. He said there were several people present. He named Rev. Shuttlesworth and the Rev. Billups. Said they were there.

Q. Did he mention that either Rev. Shuttlesworth or Rev. Billups made any statement there on that occasion?

Mr. Hall: If Your Honor please, we object. Gober himself might be incompetent to answer that question, and this witness certainly is incompetent. This is pure hearsay and it does not come within an exception to the hearsay rule as to whether this defendant made a statement in that meeting as to what a witness said at a hearing some other time as to what he said cannot bind this defendant here.

The Court: Overrule

Mr. Hall: We except.

A. He testified that the sit-down demonstrations was discussed at the meeting.

Q. Did he state whether or not Rev. Shuttlesworth participated in that discussion of the sit down demonstration?

A. He testified the meeting was in the living room of Rev. Shuttlesworth's house and that Rev. Shuttlesworth [fol. 26] participated in the discussion about the sit down demonstrations.

Mr. Hall: If Your Honor please, we would like to call the Court's attention to the City Attorney consulting with the transcript of the record on the trial below in the City Court. We would like for this record to show that in the process of asking this witness questions.

The Court: All right.

Mr. Davis: I believe there was an objection. Did the Court rule on it? You just wanted the record to show something?

Mr. Hall: The Court agreed it would be shown.

Q. Did he make any remark or statement that anyone sought volunteers or participants in this demonstration?

Mr. Shores: Your Honor, that is purely leading there.

Mr. Davis: I asked if anyone—he if made a remark that anyone.

Mr. Hall: If Your Honor please, we object. He is bringing in anyone. Anyone isn't on trial here and certainly what this witness said couldn't bind anyone not before this Court and not in the presence of this Court. The way the question was phrased is leading and putting words in the witness' mouth.

The Court: Could I hear that question?

Mr. Davis: I don't mind rephrasing the question if the Court would like.

Q. Did the witness say that Shuttlesworth sought volunteers for this demonstration, this sit in demonstration?

Mr. Hall: We object on the grounds the question is improper and the answer would be incompetent.

The Court: Overrule.

Mr. Hall: We except.

A. He testified that Rev. Shuttlesworth asked for volunteers to participate in the sit down demonstrations.

Q. Did I understand you correct, Mr. Pierce, to say that he stated Rev. Billups was there at this meeting also?

Mr. Hall: If Your Honor please, we object to this leading.

[fol. 27] Mr. Davis: I asked him if I understood him to say that?

A. He stated that Rev. Billups was there in the meeting.

Q. Did he make any reference to any list being made at this meeting held at Rev. Shuttlesworth's house?

A. He did.

Mr. Hall: If Your Honor please, Counsel is still leading. He is asking the witness whether any reference was made to a list being made.

The Court: Would it make it legal to say whether or not any discussion had about a list being made? Doesn't whether or not save it from being leading?

Mr. Hall: I don't think so, Your Honor. I think any reference by Counsel to a list being made is suggestive to

this witness and, frankly, I think any reference at all would be improper. I object strenuously to prefacing the question by mentioning of a list by Counsel.

The Court: Please let him answer.

Mr. Hall: We except.

A. He testified that there was a list made but he didn't know who made the list.

Q. I will ask you if he made any response to a question asked by Counsel for the City of Birmingham on that occasion with regard to whether or not anyone was to furnish representation for them in Court growing out of this demonstration.

Mr. Shores: Your Honor, we object to that question because it doesn't say who. We want the record to show if he is still testifying as to what Gober said, we want the record to show he is still testifying to that hearsay testimony, and if he is referring to Rev. Shuttlesworth, we would like the record to show that, and we would like him to rephrase that question.

The Court: Did you understand the question?

The Witness: Yes sir.

The Court: Please answer it.

Mr. Shores: We except.

[fol. 28] A. I don't remember Gober testifying as to anything with regard to any defense.

Q. I will ask you, Mr. Pierce, if on this same evening of April 1, 1960 in the presence and hearing of Rev. Shuttlesworth and Rev. Billups if James Albert Davis, while under oath, made any statements concerning this meeting held at Rev. Shuttlesworth's house?

Mr. Hall: If Your Honor please, we object to any testimony this witness may give with reference to any testimony that James Albert Davis might have given on the trial in the City Court on the same grounds that we objected to his testimony in reference to Gober, on the grounds that it is pure hearsay and inadmissible. On the further ground that this witness is incompetent to testify as to anything that might have occurred in the City Court. This is certainly

not the best evidence. And on the further grounds that it is irrelevant and immaterial.

The Court: Please let him answer.

Mr. Hall: Take exception, Your Honor.

A. What was the question, now?

The Court: Read it, Mr. Reporter.

(Question read)

A. He did.

Q. Will you tell the Court what, if anything, he said on this occasion that took place at the house of Rev. Shuttlesworth at this hearing or discussion wherein both Rev. Shuttlesworth and Rev. Billups were present.

Mr. Hall: If Your Honor please, we object to the question as being improper. We object to any answer as being incompetent, inadmissible under the hearsay rule.

The Court: Overrule.

Mr. Billingsley: Take exception.

A. He testified that Rev. Billups came to his school, Daniel Payne College, in a car and carried him to Rev. Shuttlesworth's house. He further testified that when he arrived there there were several people there, among which [fol. 29] was Rev. Shuttlesworth and Rev. Shuttlesworth's wife and a number of other students from Daniel Payne College. He testified that in response to Rev. Shuttlesworth asking for volunteers to participate in the sit down strikes that he volunteered to go to Pizitz at 10:30 and take part in the sit down demonstrations. He further testified that a list was made but he didn't know who made the list. He thought the list was compiled by—

Mr. Billingsley: I object. I doubt if the answer he is giving is responsive to the question. He is just making statements as to what was allegedly said.

The Court: Please leave it in.

Mr. Billingsley: We except.

A. He said he didn't know or wasn't sure who made the list and he testified that Rev. Shuttlesworth didn't say that he would furnish Counsel but told him or made the an-

nouncement at that time that he would get them out of jail.

Mr. Hall: If Your Honor please, we would like to ask the witness at this time before making an objection whether or not he is quoting the witness verbatim or if this is his interpretation of the alleged answer?

A. I am attempting to quote him verbatim.

Mr. Hall: You are attempting to quote him verbatim?

A. Yes.

Mr. Hall: This is not your interpretation?

A. That's right.

Mr. Hall: At what time was the trial in City Court?

A. It was at night. It was later than 7:30.

Mr. Hall: What date was it?

A. My best recollection is April 1st.

Mr. Hall: So, you are quoting him verbatim since last April 1st?

A. I am attempting to to the best of my recollection.

Mr. Hall: Your Honor, we object to this testimony and move it be excluded on the grounds it is incompetent and a violation of the hearsay rule. On the further grounds it is a violation of this defendant's rights: If this testimony is allowed to stand it is a violation of this defendant's rights to a fair trial, equal protection under the law as guaranteed [fol. 30] him by our own State Laws and our State Constitution and by the 14th Amendment to the Constitution of the United States.

The Court: Overrule.

Mr. Hall: We want an exception.

Q. Mr. Pierce, are you familiar with where Rev. Shuttlesworth's residence is situated?

A. Yes sir, I know where his residence is.

Q. Is that in the City of Birmingham?

A. Yes sir.

Q. Do you know it to be a fact that a number of boys—or I will put it this way. Do you know it to be a fact that James Gober and James Albert Davis did participate in sit down or sit-in demonstrations on the day of March 31, 1960?

A. Yes sir, they did.

Q. Do you know of your own knowledge that other colored boys on that same date participated in sit-in demonstrations in down town stores in the City of Birmingham?

Mr. Billingsley: I object to that, as to other colored boys as to participation in sit-ins. He brought in James Gober and James Albert Davis and now he is bringing in other persons.

Q. Let me put it this way. Other boys who attended the meeting at Rev. Shuttlesworth's house?

Mr. Billinsgley: We object. It is not shown Detective Pierce knows other boys attended this meeting at Rev. Shuttlesworth's house.

The Court: Let him answer.

Mr. Billingsley: We except.

A. Yes.

Q. Have you been told by other persons who participated in the sit-in demonstrations that they did attend this discussion at Rev. Shuttlesworth's house on March 30, 1960?

Mr. Billingsley: We object to that.

The Court: Unless they said it in the defendant's presence [fol. 31] I think probably it ought to be left out.

Mr. Davis: We withdraw the question.

Q. Did either Gober or Davis while at that Court hearing and under the conditions we have previously outlined state that other persons were present—I am speaking of in the Court room now—did they state that other persons were present who did participate in these demonstrations at Rev. Shuttlesworth's house on March 30, 1960?

A. Yes sir.

Q. Mr. Pierce, on the occasion of the trial in Recorder's Court in City Hall on April 1, 1960 did Rev. Shuttlesworth

or Rev. Billups either deny any of these statements made by the witnesses that we have been discussing, Gober and James Albert Davis?

Mr. Billingsley: We object to that. Not shown they made any statements in that particular trial.

The Court: Overrule.

Mr. Billingsley: We take exception.

A. I don't remember either of them taking the stand.

Q. Were you there during the whole proceedings?

A. Yes.

Q. And in your presence did he take the stand?

A. I don't remember if he did. My recollection is that neither of them did.

Q. Did not take the stand—that is your best judgment?

A. I am pretty sure of that.

Mr. Davis: That is all.

Mr. Shores: No questions.

(Witness excused)

Mr. Davis: That is the City's case, Your Honor.

Mr. Adams: Judge, we would like to move that the evidence be excluded in the case of City of Birmingham against Rev. F. L. Shuttlesworth for aiding and abetting in violation of the general City Code, Section 1436, and the complaint filed against him in this case, first, on the grounds that there has been no sufficient evidence in this case to establish that there was a violation on the part of [fol. 32] the defendant in this case. The sum total of the testimony was a discussion which was clearly hearsay and inadmissible. The persons who said they had discussions with him have been tried, and, first of all, they haven't been convicted and there is a serious question in the Law as to whether a man can be tried as an aider and abetter of another defendant without the conviction of the other defendant, which has not been done yet. In this case the Judge has not rendered his decision in the case.

Furthermore, there is no evidence here at all in this particular case that these defendants, that the people he was supposed to be aiding and abetting, ever did go in any particular stores or what the circumstances of what hap-

pened in the stores. None of that has been brought out in evidence here, and to whether they were told to leave or not told to leave. Maybe those things were brought out in other cases, but in order to make out a case against Rev. Shuttlesworth that would have to be brought out in this case. Each case stands on its own merits. Neither of this was brought out in either of the cases, Rev. Shuttlesworth or Rev. Billups.

I think it is essential in making out a case of aiding and abetting that you have to show that a statute was violated, and I don't think anybody can deny that all that was brought out here was that two of the people who were defendants, who have not been convicted, were in the house of F. L. Shuttlesworth and discussed sit-ins. That isn't aiding and abetting, to discuss the matter. It is certainly a man's right to discuss a thing in this Country.

First of all, we contend that even if there were some demonstration, which we say there were not, that the persons who did it had a right to do so under the Constitution of the United States, 14th Amendment. But we don't even get to that question here because we haven't made a determination that the thing had been done. We don't have a showing that there was a conviction. We don't show what places the so-called people he aided and abetted went [fol. 33] to—Kresses or Loveman's or Newberry's or anything—nothing is in the record to show that. I am not saying that it happened.

I think that the statute which is charged with aiding and abetting of the violation thereof is unconstitutional in that it requires any person who warns a person to stay off the premises, it does not specify whether the owner or the person in charge of the premises, would be the proper person to make the warning. If anybody came up and if somebody didn't move after someone told them to leave, they would be guilty of violating the Trespass After Warning Statute, which means the statute is unconstitutional, and if the statute is unconstitutional, certainly no one could be guilty of aiding and abetting and unconstitutional statute.

In this particular case we don't even have the issue coming before the Court as to whether these people were

in a publicly owned place and whether they were peaceably demonstrating, which we have a right to do. We don't have that at all, because there is no testimony to that effect.

We submit the testimony that was given is incompetent because it was hearsay testimony. And on the grounds that there is no showing in this case against Rev. Shuttlesworth that these people were boisterous or violent or did anything which was in violation of law, and how could he be guilty of aiding and abetting violation of the law?

I submit the City has failed to make out a case flagrantly in the case of Rev. Shuttlesworth and Rev. Billups.

I will also file, in addition to that, Judge, a written motion to that effect with the Court's permission.

The Court: Yes. I overrule.

Mr. Hall: If Your Honor please, we want an exception to Your Honor's ruling.

Mr. Hall: If Your Honor please, we rest.

The Court: All right. I think, to preserve the record perfectly, your last motion should include both defendants that are on trial together.

[fol. 34] Mr. Adams: Yes sir.

The Court: All right.

Mr. Davis: Judge, we have nothing further.

Judge, the City doesn't care to argue on the assumption and stipulation that Counsel for the Defense would not see fit to argue the case.

The Court: What say the defense?

Mr. Hall: If Your Honor please, could we have a short recess?

The Court: Please let's everybody come back at 11:20.

(Whereupon there was a short recess, and there being no further arguments by Counsel, the following occurred):

The Court: If Counsel will meet back with me at 3:30 P.M., I will give the judgments in these cases.

(Whereupon Court was recessed until 3:30 P.M., at which time the following occurred):

[fol. 35] The Court: May I ask if James Albert Davis is present?

A Voice: Yes.

The Court: James Gober. Roy Hutchinson. Robert J. King. Robert L. Parker, Jr. Robert D. Sanders. Jessie Walker.

A Voice: Here.

The Court: William West.

A Voice: Here.

The Court: Roosevelt Westmoreland and Willie J. Willis. Anyone whose name I didn't call among the students? Charles Billups.

A Voice: Here.

The Court: F. L. Shuttlesworth.

A Voice: Here.

SENTENCE

The Court: Taking the Charge of Trespass After Warning as applied to each of the names just called, there was a slight change in the previous sentence. The Court finds the defendant and each of those called, finds the defendant guilty as charged in the complaint and fixes the punishment and fine at $100.00 and 30 days hard labor for the City. I have indicated that appeal bond will probably be filed.

Mr. Shores: Yes sir. But, Your Honor, before these appeal bonds are filed we would like for you to suspend the sentence to give us a chance to file a motion for a new trial and continue them under the same bond.

The Court: What do you say to that, Mr. Walker?

Mr. Walker: I have no objection to it. In other words, he has a right to file a motion for new trial. I have no objection to it. In other words, if they want to be free on the same bond and if that is agreeable to the Court, it is agreeable with me.

The Court: Mr. Davis, a motion was just made in each of the Trespass After Warning cases that—of you will, restate the motion, please.

Mr. Shores: That the sentence in each case be suspended and the defendants be continued under the same bond until we file and have a motion for a new trial determined.

Mr. Davis: Judge, I think we prefer things to go in their normal course.

[fol. 36] The Court: If there is to be appeal bonds in each case, I do not see how any hardship or prejudice would result from letting it be done forthwith.

Mr. Shores: Well, Your Honor, we are in a position to file it forthwith, but, as Counsel knows, these are quasi-criminal cases and to file an appeal bond now this Court would really lose jurisdiction, and if His Honor doesn't see fit to suspend the sentence, we would beg permission to file a motion for a new trial and let the motion be entered as filed and Your Honor can enter his ruling and give us a chance to file the motions within the next day or two and we will perfect the appeals today.

The Court: Would you mind giving the Court the benefit of your thought about any advantage or any favorable result or any profit to the defendants by doing that?

Mr. Shores: In a motion for a new trial we feel we could re-raise several points that were not really raised during the trial and indicate them as error in this motion for a new trial. In other words, if Your Honor would entertain them, we would make a motion for a new trial at this time and beg leave of the Court for time to specify the grounds for a new trial and let the record show that the motion for a new trial was filed immediately after the sentence and that the bond would be filed after—let it be shown the bond is filed after the motion for a new trial is ruled upon.

Mr. Adams: Judge, I think one of the thoughts in mind here is it is almost axiomatic for lawyers that a motion for a new trial should be filed after the sentence of the defendant, and it might be considered negligence if such a motion were not filed regardless of what the Court's decision may be on it. And we also are in this position in these cases. It is my understanding that the motion for new trial does not necessarily suspend the running of time in which the record must be on file with the Court of Appeals and, therefore, in order to save the time in which we have to perfect the appeal and not let the time just [fol. 37] passing when the motion is before Your Honor consume the time we have to file our record on appeal, we are asking that the motion be allowed to be filed before we file the notice of appeal, and if the Court rules against us on the motion we will file immediately our appeal.

Now, in the event that the Court sees fit to want to dispose of the thing immediately, we would like to file now a motion orally after sentencing, which has been done, sentence has been given, we would file our motion orally and subsequently put it in writing, and the Judge may rule, if he is so disposed, now, as to how he feels about it. But we think, as officers of the Court and lawyers, that a motion for a new trial certainly is consistent with good practice and may be considered error on the part of Counsel if such were not filed. That is our thought about it.

The Court: All right. You want the execution of sentence held in abeyance until such time as your motion for new trials can be formally presented?

Mr. Shores: That is our motion, Your Honor.

The Court: Would there be anything—would there be any advantage to the defendants to put that motion in writing formally?

Mr. Shores: We would have to designate, and it would take some time to spell out the various grounds that we feel on which we are entitled to a new hearing or a new trial. We could have it done by Monday.

The Court: I won't be here Monday.

Mr. Shores: Well, the following Monday or any date Your Honor sees fit. As I say, it is not going to jeopardize the City to grant this little stay.

The Court: If there is any good or any advantage to be had, the Court wants it had. I just didn't see how there was to be any. Now, suppose we do it this way, then. As I understand the law, I can suspend the judgment of sentence for 24 hours, and I am doubtful about being able to do it longer in City appeal cases. Would this time tomorrow be too soon?

It seems to me that you have here the ten students and the Court thinks they were misused and misled into a viola-
[fol. 38] tion of a City Ordinance and has so ruled. Now, if there would be any stronger position before the Court of Appeals to have also a denied motion for a new trial, I would want them to have that.

Mr. Shores: We feel they would, Your Honor. Could Your Honor do this? As indicated, we have made our motion for a new trial and would Your Honor give us leave—

I mean you can rule on the motion and deny the motion now and give us leave to put it in writing for the record?

The Court: Sure.

Mr. Shores: Then we would immediately make our appeal bonds and the sequence of the record would show a motion for a new trial, the motion overruled, and the appeal perfected.

The Court: What says the City?

Mr. Davis: I am not sure I see what he is trying to accomplish other than the fact he would like to clutter this record further, but I would prefer not to yield on any point on this thing. Of course, they are entitled to file their motion. I have no objection to giving them several days to file their motion, but other than that, I wouldn't want to be agreeable to any extensions or waivers as to bonds or things of that description.

Mr. Shores: We will file the bond today. We are asking we be permitted to spell out the oral motion we have already made.

The Court: After your appeal bond is filed?

Mr. Shores: That's right.

The Court: I think that is all right.

Well, it was the same judgment and sentence in each of the student cases.

That brings us, I believe, to three other cases, the case of Charles Billups charged with aiding and abetting. The Court finds the defendant guilty as charged in the complaint and fixes his punishment and fine in the sum of $25.00 and 30 days hard labor for the City of Birmingham.

In the case of F. L. Shuttlesworth, charged with aiding and abetting, the Court finds the defendant guilty as [fol. 39] charged in the complaint and fixes his punishment at a fine in the sum of $100.00 and 180 days hard labor for the City.

The case of F. L. Shuttlesworth, charged with false information, the defendant moved for a dismissal and the motion was granted.

Mr. Shores: Your Honor, as to those last two cases we would like to move orally for a motion for a new trial with leave to file written motion within a reasonable time.

The Court: With the appeal bonds forthwith made?

Mr. Shores: That's right.

The Court: All right.

Mr. Shores: How long will Your Honor give us to write those motions up since the bonds will have already been filed? May we have a couple weeks?

The Court: Well, haven't we conscientiously canvassed the issues?

Mr. Shores: We have.

The Court: Is there anything to be gained by thrashing the straw again?

Mr. Shores: We would just like to have it ruled on. Let the record show that the motion is denied.

The Court: All right, so ordered.

Mr. Shores: Then, we will make note of an appeal in each case separately and severally and will forthwith file the appeal bond. What will that bond be, Your Honor?

The Court: $300.00 I believe is mentioned in each case.

The foregoing was all the testimony and oral proceedings.

[fol. 40] Reporter's and Clerk's Certificates to foregoing transcript (omitted in printing).

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[fol. 42]

IN THE COURT OF APPEALS OF ALABAMA

---

F. L. SHUTTLESWORTH, Appellant,

vs.

THE CITY OF BIRMINGHAM, Appellee.

---

ASSIGNMENT OF ERRORS

The Appellant says that there is manifest error in the foregoing Transcript of the record of the proceedings had and done in the Honorable Circuit Court of Jefferson County, Alabama, to the hurt and prejudice of this appellant, and for error assigns each of the following separately and severally:

1. The Court erred in overruling Appellant's Motion to Strike, filed in this cause. (Tr. 2, 3, 7 & 14)

2. The Court erred in overruling Appellant's Demurrers filed in this cause. (Tr. 3, 4, 7 & 14)

3. The Court erred in overruling Appellant's Motion to Exclude the Evidence, filed in this cause. (Tr. 5, 6, 7 & 33)

4. The Court erred in overruling Appellant's Motion for a New Trial. (Tr. 9, 10, 11 & 39)

5. The Court erred in allowing Detective Charles L. Pierce, a Police Officer of the City of Birmingham, to testify as to his recollection of testimony given in the Recorder's Court of the City of Birmingham, by witnesses in the trial of this matter in aforesaid Recorder's Court. (Tr. 17-31)

Arthur D. Shores, Orzell Billingsley, Jr., Peter A. Hall, Oscar W. Adams, J. Richmond Pearson, Attorneys for Appellant.

[fol. 43] Certificate of Service (omitted in printing).

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[fol. 44]

IN THE COURT OF APPEALS OF THE

STATE OF ALABAMA ..... JUDICIAL DEPARTMENT

OCTOBER TERM, 1960-61

6 Div. 802

---

F. L. SHUTTLESWORTH,

v.

CITY OF BIRMINGHAM.

Appeal from Jefferson Circuit Court

---

November 2, 1960

CERTIFICATE FILED
January 26, 1961

TRANSCRIPT FILED
April 18, 1961

Come the parties by attorneys, and argue and submit this cause for decision.

ORDER OF AFFIRMANCE—May 30, 1961

Come the parties by attorneys, and the record and matters therein assigned for errors being submitted on briefs and duly examined and understood by the court, it is considered that in the record and proceedings of the Circuit Court there is no error. It is therefore considered that the judgment of the Circuit Court be in all things affirmed. It is aiso considered that the appellant pay the costs of appeal of this court and of the Circuit Court.

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[fol. 45]

IN THE COURT OF APPEALS OF THE

STATE OF ALABAMA ..... JUDICIAL DEPARTMENT

OCTOBER TERM, 1960-61

6 Div. 802

---

F. L. SHUTTLESWORTH,

v.

CITY OF BIRMINGHAM.

Appeal from Jefferson Circuit Court

---

OPINION—May 30, 1961

CATES, Judge: Appellant was convicted in the Circuit Court of Jefferson County of violating §824 of the General City Code of Birmingham of 1944, which reads as follows:

> "It shall be unlawful for any person to incite, or aid or abet in, the violation of any law or ordinance of the city, or any provision of state law, the violation of which is a misdemeanor."

[fol. 46] The particular corollary crime of which he was accused of inciting others to commit is found in §1436 of the City Code. This section makes it an offense to remain on the premises of another after a warning. See *James Gober*

v. *City of Birmingham*, 6 Div. 797 (Ms.), —— Ala. App. ——, this day decided.

We can only consider one point raised by the assignments of error and the propositions of law and argument, i. e., the sufficiency of the evidence to show a violation of §824, supra.

The statement of the case set forth in appellant's brief (which we are entitled to rely upon without regard to the record itself in civil cases) is that "Shuttlesworth asked for volunteers, and that there were some volunteers to take part in, 'sit-down' demonstrations"; Shuttlesworth promised to get them out of jail.

The appellant's argument on this point deliberately evades the effect of the word "incite" in the city ordinance, and deals solely with the joint responsibility of an aider and abetter. It is sufficient to answer this argument by a quotation from Jowitt's *Dictionary of English Law*, p. 953:

> "Everyone who incites any person to commit a crime is guilty of a common law misdemeanour, even though the crime is not committed. If the crime is actually committed, he is an accessory before the fact in the case of felony, and equally guilty, in the case of treason or misdemeanour, with the person who commits the crime."

A sit-down demonstration being a form of trespass after warning, denotes a violation of both State law and especially of §1436 of the City Code, supra.

There is no question of the restriction of any right of free speech or other assimilated right derived from the [fol. 47] Fourteenth Amendment, since the appellant counseled the college students not merely to ask service in a restaurant, but urged, convinced and arranged for them to remain on the premises presumably for an indefinite period of time. There is a great deal of analogy to the sit-down strikes in the automobile industry referred to in *National Labor Relations Board* v. *Fansteel Metallurgical Corp.*, 306 U. S. 240.

As presented by the appellant's assignments of error and brief, the judgment below is due to be

*Affirmed.*

[fol. 48]

IN THE COURT OF APPEALS OF THE

STATE OF ALABAMA ..... JUDICIAL DEPARTMENT

October Term, 1960-61

6 Div. 802

---

F. L. SHUTTLESWORTH,

v.

CITY OF BIRMINGHAM.

Appeal from Jefferson Circuit Court

---

APPLICATION FOR REHEARING—June 14, 1961

Now comes appellant, in the above styled cause, and respectfully moves this Honorable Court to grant appellant a rehearing in said cause, and to reverse, revise and hold for naught its Judgment rendered on to-wit, the 30th day of May, 1961, and affirming the Judgment of the Circuit Court of Jefferson County, Alabama, and to enter an Order, reversing said Judgment.

Arthur D. Shores, Orzeli Billingsley, Jr., Peter A. Hall, Oscar W. Adams, Jr., J. Richmond Pearson, Attorneys for Appellant.

ORDER OVERRULING—June 20, 1961

It is ordered that the application for rehearing be and the same is hereby overruled.

Cates, Judge.

[fol. 49]

IN THE COURT OF APPEALS OF THE
STATE OF ALABAMA

OPINION ON REHEARING—June 20, 1961

CATES, Judge: The application for rehearing in this case is supported by a brief which contains two propositions of law, both of which are predicated on the appellant's having been convicted under §1436 of the General City Code of Birmingham.

This appellant was convicted of inciting others to violate §1436. The propositions accordingly have no bearing on the facts.

*Application Overruled.*

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[fol. 49a] [File endorsement omitted]

[redacted] 6 Div. 764

IN THE SUPREME COURT OF ALABAMA

No. 764 Sixth Division

Ex Parte F. L. Shuttlesworth

---

F. L. SHUTTLESWORTH, Appellant,

CITY OF BIRMINGHAM, Appellee.

---

Arthur D. Shores, Peter A. Hall, Orzell Billingsley, Jr., J. Richmond Pearson, Oscar W. Adams, Jr., Attorney for Appellant.

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PROCEEDINGS ON PETITION FOR CERTIORARI

July 5, 1961 Submitted on Briefs

September 25, 1961 Writ Denied: No Opinion

October 4, 1961 Application for Rehearing Filed

November 16, 1961 Application for Rehearing Overruled.

[fol. 49b]

No. 764 Sixth Division

Ex Parte: F. L. Shuttlesworth

IN THE SUPREME COURT OF ALABAMA

---

F. L. SHUTTLESWORTH, Appellant,

vs.

CITY OF BIRMINGHAM, Appellee.

---

PETITION FOR CERTIORARI—Filed July 5, 1961

[fol. 50]

To the Honorable Chief Justice and Associate Justice of the Supreme Court of Alabama

1. Comes the Appellant, by and through his Attorneys, Arthur D. Shores, Peter A. Hall, Orzell Billingsley, Jr., Oscar W. Adams, Jr., and J. Richmond Pearson, and respectfully petitions this Honorable Court to review, revise, reverse and hold for naught that certain judgment of the Court of Appeals, on to-wit: May 30, 1961, wherein F. L. Shuttlesworth was Appellant and the City of Birmingham was Appellee, which Judgment affirms the Judgment of the Circuit Court of Jefferson County, Alabama.

2. Your petitioner avers that application to the Court of Appeals for a Rehearing of said cause and Brief in support thereof were duly filed by your petitioner within the time required by law, and that said application for rehearing was overruled by said Court of Appeals on the 20th day of June, 1961.

3. Your petitioner respectfully shows unto the Court that this cause arose from a complaint filed by the City of Birmingham, charging your petitioner as follows:

> "Comes the City of Birmingham, Alabama, a municipal corporation, and complains that F. L. Shuttles-

worth, within twelve months before the beginning of this prosecution, and within the City of Birmingham or the police jurisdiction thereof, did incite or aid or abet in the violation of an ordinance of the City, to-wit, Section 1436 of the General City Code of Birmingham [fol. 51] of 1944, in that F. L. Shuttlesworth did incite or aid or abet another person to go or remain on the premises of another after being warned not to do so, contrary to and in violation of Section 824 of the General City Code of Birmingham of 1944."

4. Your petitioner filed a Motion to Quash the Complaint and Demurrers to the Complaint, on grounds that the Complaint was so vague and indefinite as not to apprise the Appellant of what he was called upon to defend, and further, that the ordinances which formed the basis of the prosecution, as applied to appellant, constituted an abridgement of the privileges and immunities guaranteed by the Constitution of the United States and that the ordinances were unconstitutional on their face.

5. The Court overruled the Motion to Quash and the Demurrers whereupon petitioner was tried without a jury, and was found guilty as charged, and fined One Hundred ($100.00) Dollars and costs, and sentenced to a term of Ninety (90) days of hard labor for the City of Birmingham.

6. Your petitioner filed a Motion to Exclude the Evidence, at the close of the City's case, which Motion was denied. After judgment and sentences, petitioner filed a Motion for a New Trial, which Motion was denied, and petitioner perfected his appeal.

7. Your petitioner further shows unto Your Honors that the Court of Appeals erred in affirming and failing to reverse said cause, in the following ways, to-wit: The Court based its judgment in this cause upon the opinion judgment rendered in the case of *James Albert Davis vs. City of Birmingham*, Sixth Division—797, decided May 30, 1961.

8. That the Propositions of Law involved, which petitioner claims should be reviewed and revised by this Court, are as follows:

A. That the Ordinances and Complaint, the basis of the prosecution, are unconstitutional on their face, that they are so vague, indefinite and uncertain as to constitute a deprivation of liberty, without due process of law, in violation of the Fourteenth Amendment to the United States Constitution.

b. That the Ordinance and Complaint, the basis of the prosecution, as applied to petitioner, constitute an abridgement of the privileges and immunities, and a denial of the equal protection of the laws, all in violation of the Fourteenth Amendment to the United States Constitution.
[fol. 52] The Court of Appeals erred in failing to rule that the conviction of petitioner was a violation of due process of law, an abridgement of the privileges and immunities of the petitioner, in that the petitioner was denied equal protection of the law, all in violation of the Fourteenth Amendment to the Constitution of the United States.

Wherefore, Your petitioner most respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Court, directed to the Court of Appeals of Alabama, commanding and requiring said Court to certify and send to this Court, on a day certain to be designated by this Court, a full and complete transcript of record, and all proceedings of said Court of Appeals of Alabama, in the Cause numbered and entitled aforesaid, to the end that this cause may be reviewed and determined by this Honorable Court, and that this Court thereupon proceed to review and correct the errors complained of and to reverse the Judgment of the Court of Appeals or render such Judgment as said Court should have rendered.

Petitioner prays that this Honorable Court suggest and require the Court of Appeals to Stay or recall its Certificate of Affirmance of said cause, during the pendency of this petition.

And petitioner prays for such other, further and additional relief in the premises as to this Court may seem

appropriate, and to which he may be entitled, and your petitioner will ever pray.

Respectfully submitted,

Arthur D. Shores, Peter A. Hall, Orzell Billingsley, Jr., Oscar W. Adams, Jr., J. Richmond Pearson, By Orzell Billingsley, Jr., Attorneys for Appellant.

[fol. 53] *Duly sworn to by Orzell Billingsley, Jr., jurat omitted in printing.*

Certificate of Service (omitted in printing).

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[fol. 54]

IN THE SUPREME COURT OF ALABAMA

No. 764 — Sixth Division

Ex Parte: F. L. Shuttlesworth

---

F. L. SHUTTLESWORTH, Appellant,

vs.

CITY OF BIRMINGHAM, Appellee.

---

APPLICATION FOR REHEARING—Filed October 4, 1961

Now comes Appellant, in the above styled cause, and respectfully moves this Honorable Court to grant Appellant a Rehearing in said cause, and reverse, revise and hold for naught its Judgment rendered on to-wit, the 21st day of September, 1961, denying appellant the Writ of Certiorari and dismissing the petition, and to enter an Order reinstating appellant's petition, and directing that a Writ of Certiorari be issued out of and under the Seal of this Court, to the Court of Appeals of Alabama, to the end that this cause may be reviewed and determined by this Honorable Court.

Appellant further moves the Court to grant a Stay of Execution in this cause, during the pendency of this Application for a Rehearing.

Submitted herewith is a Brief and Argument, in support of said Motion.

Arthur D. Shores, Peter A. Hall, Orzell Billingsley, Jr., Oscar W. Adams, J. Richmond Pearson, Attorneys for Appellant.

/s/ Orzell Billingsley, Jr.

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[fol. 55]

In the Supreme Court of Alabama

The Court met pursuant to adjournment

Present: All the Justices
(Lawson's Division Sitting)

6th Div. 764

Ex Parte: F. L. Shuttlesworth, Petitioner

Petition for Writ of Certiorari to the Court of Appeals

(Re: F. L. Shuttlesworth v. City of Birmingham)

Jefferson Circuit Court

Order Overruling—November 16, 1961

It is hereby ordered that the application for rehearing filed on October 4, 1961, be and the same is hereby overruled.

Livingston, C. J., Lawson, Stakely and Merrill, JJ., concur.

[fol. 56] Clerks' Certificates to foregoing transcript (omitted in printing).

[fol. 1]

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT OF ALABAMA, IN AND FOR JEFFERSON COUNTY

No. 20778

THE CITY OF BIRMINGHAM,

vs.

CHARLES BILLUPS.

To-Wit:

APPEAL BOND—Filed May 4, 1960

The State of Alabama )
) City of Birmingham
Jefferson County. )

We, Charles Billups, principal and Jas Esdale sureties, acknowledge ourselves indebted to the City of Birmingham, a municipal corporation, in the sum of Three Hundred—no/100 Dollars, for the payment of which, well and truly to be made, we bind ourselves, our administrators, and executors. But the condition of the above obligation is such, that whereas the above bounden principal was tried and convicted on the charge of

Count 1. Aiding and Abetting Sec 824 GCC

Count 2. .....

Count 3. .....

and has prayed and obtained an appeal to the Circuit Court of Jefferson County, Alabama, from the judgment of the Recorder's Court of the City of Birmingham, adjudging him to pay a fine of One Hundred and no/100 Dollars, Costs Five Dollars; and to perform hard labor for 180 days, rendered the 4 day of April 1960.

Now, if the said principal shall appear at present Term of the Circuit Court of Jefferson County, Alabama, and from term to term thereafter until discharged by law, then this obligation to be void, otherwise to remain in

full force and effect. And as against this obligation we waive all right under the laws of Alabama to claim any personal property as exempt from levy and sale.

Witness our hand and seals this 4 day of April 1960.

Charles Billups (L.S.), 3516 N 64th Pl, Jas. Esdale (L.S.), 809 No 31 St., By Lacey Alexander (L.S.), Atty In fact.

Approved 4 day of April 1960.

William Conway, Recorder of the City of Birmingham.

[File endorsement omitted]

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[fol. 2]

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT OF ALABAMA

No. 20778

CITY OF BIRMINGHAM, a Municipal corporation, Plaintiff,

v.

CHARLES BILLUPS, Defendant.

COMPLAINT—Filed October 11, 1960

Comes the City of Birmingham, Alabama, a municipal corporation, and complains that Charles Billups, within twelve months before the beginning of this prosecution, and within the City of Birmingham or the police jurisdiction thereof, did incite or aid or abet in the violation of an ordinance of the City, to-wit, Section 1436 of the General City Code of Birmingham of 1944, in that Charles Billups did incite or aid or abet another person to go or remain on the premises of another after being warned not to do so, contrary to and in violation of Section 824 of the General City Code of Birmingham of 1944.

Watts E. Davis, Attorney for City of Birmingham.

[File endorsement omitted]

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT OF ALABAMA

No. 20778

---

CITY OF BIRMINGHAM,

VS.

CHARLES BILLUPS, Defendant.

---

MOTION TO STRIKE—Filed October 11, 1960

Comes now Charles Billups, defendant in this cause, and moves to strike the complaint in this cause, and as grounds for said Motion, sets out and assigns the following, separately and severally:

1. That the complaint, affidavit, etc., is not sworn to in this cause.

2. That the allegations of the said complaint are so vague and indefinite, as not to apprise this defendant of what he is called upon to defend.

3. That the ordinances or statutes upon which are founded the complaint in this cause, as applied to this defendant, as a citizen of the State of Alabama, and of the United States, constitute an abridgment of the freedom [fol. 3] of assembly, speech and liberties secured to the Defendant, by the Constitution and laws of the State of Alabama and the Fourteenth Amendment of the Constitution of the United States of America.

4. That the said ordinances or statutes which are the basis for the affidavit, information or complaint in this cause, as applied to the defendant, constitute an abridgment of privileges and immunities guaranteed defendant, as a citizen of the United States, in violation of the Constitution and laws of the State of Alabama, and of the Fourteenth Amendment of the United States Constitution.

5. That Sections 824 and 1436 of the General City Code of the City of Birmingham, as applied to this defendant,

a Negro citizen of the United States, constitute a denial of due process and equal protection of law, in violation of the Fourteenth Amendment to the Constitution of the United States of America.

6. That the said affidavit, information or complaint, does not charge any offense, which is cognizable by this Court.

Arthur D. Shores, Peter A. Hall, Orzell Billingsley, Jr., Oscar W. Adams, Jr., J. R. Pearson, Attorneys for Defendant.

[File endorsement omitted]

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IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT OF ALABAMA

No. 20778

---

CITY OF BIRMINGHAM,

vs.

CHARLES BILLUPS, Defendant.

---

DEMURRERS—Filed October 11, 1960

Comes now Charles Billups, defendant in this cause, and demurs to the complaint in this cause, and to each and every count thereof, separately and severally, and as grounds for such demurrer sets out and assigns the following, separately and severally:

1. The affidavit or information which supports the complaint in this cause, does not charge defendant with any offense under the Constitution and laws of the State of Alabama.

2. That the complaint, affidavit or information upon which this cause is based is insufficient to support prose- [fol. 4] cution of this cause, in that no offense is charged which is cognizable by this Honorable Court.

3. That the allegations of the complaint and each count thereof are so vague and indefinite as not to apprise this defendant of what he is called upon to defend.

4. That the ordinances, Section 1436 and Section 824 of the 1944 General City Code of Birmingham, Alabama, as applied to this defendant, are invalid in that they violate Section 4, Article 1, of the Constitution of Alabama, and the First and Fourteenth Amendments to the Constitution of the United States of America.

5. That Section 1436 and Section 824 of the 1944 General City Code of Birmingham, Alabama, which support the complaint, affidavit or information in this cause, as applied to this defendant, a citizen of the State of Alabama and of the United States, constitute an abridgment of freedom of speech and assembly violative of rights and liberties secured the defendant by the First and Fourteenth Amendments to the Constitution of the United States of America.

6. That the aforesaid ordinances as applied to defendant, are unconstitutional on their face in that they are so vague as to constitute a deprivation of liberty without due process of law in violation of the provisions of the Fourteenth Amendment to the United States Constitution.

7. That the said Ordinances or Statutes in this case, as applied to defendant, constitute an abridgment of privileges and immunities guaranteed defendant as a citizen of the United States, in violation of the Fourteenth Amendment to the United States Constitution.

8. That the said Ordinances, as applied to defendant, constitute a denial of equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States of America.

Arthur D. Shores, Peter A. Hall, Orzell Billingsley, Jr., Oscar W. Adams, Jr., J. R. Pearson, Attorneys for Defendant.

[File endorsement omitted]

[fol. 5]

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT OF ALABAMA

No. 20778

---

CITY OF BIRMINGHAM, Plaintiff,

versus

CHARLES BILLUPS, Defendant.

---

MOTION TO EXCLUDE THE EVIDENCE—Filed October 11, 1960

1. The complaint charging defendant, a Negro, with violation of 824 of the General City Code of Birmingham of 1944, to-wit, aiding and abetting in the violation of 1436 of the General City Code of Birmingham of 1944, to-wit, an alleged trespass upon land after being forbidden to enter or remain or after being told to leave is invalid in that the evidence establishes merely that persons alleged to have been aided and abetted by the defendant were peacefully upon the premises of various department stores, an establishment performing an economic function invested with the public interest, as a customer, visitor, business guest or invitee, and there is no basis for the charge recited by the complaint other than an effort to exclude those persons who were alleged to have been aided and abetted by the defendant from the various eating facilities because of their race or color; defendant, at the same time is being denied his right of freedom of speech and assembly in that he has been criminally prosecuted for an alleged peaceful discourse with other citizens of his race in regards to achieving first class citizenship; thereby depriving him of liberty without due process of law and of the equal protection of the laws secured by the Fourteenth Amendment of the United States Constitution.

2. The evidence offered against defendant, a Negro, in support of the complaint charging him with violation of 824 of the General City Code of Birmingham was wholly

incompetent and hearsay evidence upon the grounds that the testimony offered by the City of Birmingham was based on hearsay and that the witness, Detective Pierce, was not recounting the fact personally known to him. Further, that the testimony of the witness, Detective Pierce, was based upon the record of the proceedings in the Recorders Court and the instant proceedings being a trial de novo said records of the proceedings in the Recorders Court are only admissible for the purpose of impeachment. There being no testimony offered by the defendant, any admission of the records of proceedings in the Recorders Court in this proceeding constitutes a violation of the defendant's constitutional rights under the Laws of the State of Ala-[fol. 6] bama and under the Laws and Constitution of the United States of America specifically those rights secured by the Fourteenth Amendment of the United States Constitution.

3. That even if the evidence offered by the City of Birmingham was held to be legal it only establishes that the prosecution of the defendant was procured for the purpose of preventing him from engaging in peaceful assembly with others for the purpose of speaking, and; otherwise peacefully protesting in public places the refusal of the preponderant number of stores, facilities and accommodations open to the public in Birmingham, Alabama, to permit the defendant, a Negro, and other members of defendant's race from enjoying the access to such stores, facilities, and accommodations afforded members of other races; and that by this prosecution, prosecuting witnesses and arresting officers are attempting to employ the aid of the Court to enforce a racially discriminatory policy contrary to the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

4. The evidence against the defendant, a Negro, in support of the charge of his violation of 824 the General City Code of Birmingham of 1944, clearly indicates that those persons alleged to have acted as a result of the aiding and abetting of the defendant, had accepted an invitation

to enter and purchase articles in the various department stores in the City of Birmingham, stores open to the public, but had not been allowed to obtain food service on the same basis as that offered white persons, because of their race or color; and, that in furtherance of this racially discriminatory practice of the various department stores in the City of Birmingham, the defendant was arrested, thereby violating defendant's rights under the equal protection and due process clauses of the Fourteenth Amendment of the United States Constitution, to free speech and the right to peaceful assembly.

Oscar W. Adams, Jr., Orzell Billingsley, Jr., Peter A. Hall, Arthur D. Shores, J. Richard Reams, Attorneys for Defendant.

[File endorsement omitted]

---

[fol. 7]

IN THE CIRCUIT COURT OF THE
TENTH JUDICIAL COURT OF ALABAMA

Appealed from Recorder's Court

(Aiding & Abetting)

Honorable Geo. Lewis Bailes, Judge Presiding

---

CITY OF BIRMINGHAM,

vs.

CHARLES BILLUPS.

---

JUDGMENT ENTRY—October 11, 1960

This the 11th day of October, 1960, came Wm. C. Walker, who prosecutes for the City of Birmingham, and also came the defendant in his own proper person and by attorney, and the City of Birmingham files written Complaint in this cause, and the defendant being duly arraigned upon said Complaint for his plea thereto says that he is not guilty; and defendant files motion to strike, and said motion being considered by the Court, it is ordered and adjudged by the Court that said motion be and the same is hereby

overruled, to which action of the Court in overruling said motion the defendant hereby duly and legally excepts; and the defendant files demurrers, and said demurrers being considered by the Court, it is ordered and adjudged by the Court that said demurrers be and the same are hereby overruled, to which action of the Court in overruling said demurrers the Defendant hereby duly and legally excepts; and the defendant files motion to exclude the evidence, and said motion being considered by the Court, it is ordered and adjudged by the Court that said motion be and the same is hereby overruled, to which action of the Court in overruling said motion, the defendant hereby duly and legally excepts; and the Court finds the defendant guilty as charged in the Complaint, and thereupon assessed a fine of Twenty-five ($25.00) dollars and costs against said defendant. It is therefore considered by the Court, and it is the judgment of the Court that said defendant is guilty as charged in said Complaint, and that he pay a fine of Twenty-five ($25.00) dollars and costs of this cause.

And said defendant being now in open Court, and having presently failed to pay the fine of $25.00 and the costs of $5.00 accrued in the Recorder's Court of the City of Birmingham, or to confess judgment with good and sufficient security for the same, it is therefore considered by the Court, and it is ordered and adjudged by the Court, and it is the sentence of the Law, that the defendant, the said Charles Billups, perform hard labor for the City of Birmingham for fifteen days, because of his failure to pay said fine and costs of $5.00 accrued in said Recorder's Court, or to confess judgment with good and sufficient security therefor.

It is further considered by the Court, and it is ordered and adjudged by the Court, and it is the sentence of the Law, that the defendant, the said Charles Billups, per-
[fol. 8] form additional hard labor for the City of Birmingham for thirty days, as additional punishment in this cause.

And the costs legally taxable against the defendant in this cause amounting to forty-seven and 25/100 ($47.25) dollars, not being presently paid or secured, and $4.00 of said amount being State Trial Tax, $3.00, and Law Li-

brary Tax, $1.00, leaving forty-three and 25/100 ($43.25) dollars taxable for sentence, it is ordered by the Court that said defendant perform additional hard labor for the County for fifty-eight days, at the rate of 75¢ per day to pay said costs. It is further ordered by the Court that after the sentence for the City of Birmingham has expired, that the City authorities return the defendant to the County authorities to execute said sentence for costs.

It is further considered by the Court that the State of Alabama have and recover of the said defendant the costs in this behalf expended for feeding the defendant while in jail, for which let execution issue.

And defendant files motion for a new trial in this cause, and said motion coming on to be heard and determined by the Court, it is ordered by the Court, and it is the judgment of the Court that said motion be and the same is hereby overruled.

And notice of appeal being given, and it appearing to the Court that, upon the trial of this cause, certain questions of Law were reserved by the defendant for the consideration of the Court of Appeals of Alabama, it is ordered by the Court that the execution of the sentence in this cause be and the same is hereby suspended until the decision of this cause by said Court of Appeals of Alabama.

It is further ordered by the Court that the Appeal Bond in this cause be and the same is hereby fixed at $300.00, conditioned as required by Law.

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[fol. 9]

IN THE CIRCUIT COURT OF THE
TENTH JUDICIAL CIRCUIT OF ALABAMA

No. 20778

CITY OF BIRMINGHAM, a Municipal Corporation, Plaintiff,

vs.

CHARLES BILLUPS, Defendant.

---

MOTION FOR A NEW TRIAL—Filed October 11, 1960

Now comes the defendant, in the above styled cause, and with leave of the Court, first had and obtained, and moves

this Honorable Court to set aside the verdict and judgment rendered on to-wit, the 11th day of October, 1960, and that this Honorable Court will grant the defendant a new trial, and as grounds for said Motion sets out and assigns the following, separately and severally:

1. That the Judgment of the Court in said case is contrary to the law.

2. For that the judgment of the Court is contrary to the facts.

3. For that the judgment of the Court is contrary to the law in the case.

4. In that the judgment of the Court is not sustained by the great preponderance of the evidence in the case.

5. For that the Judgment of the Court is not sustained by the great preponderance of the evidence in the case.

6. For that the Judgment of the Court is so unfair, as to constitute a gross miscarriage of justice.

7. For that the sentence is excessive.

8. For that the Court erred in over-ruling objections, by the defendant to the introduction of evidence on behalf of the City of Birmingham, Alabama, in this case.

9. For the Court erred in overruling objections by the defendant to the introduction of evidence which was so biased and prejudiced that the defendant was denied the right of a fair and impartial trial.

10. For the Court erred in overruling objections by the defendant to the introduction of evidence, which was so biased and prejudiced that the defendant was denied the right of a fair and impartial trial.

[fol. 10] 11. The Court erred in overruling defendant's demurrers filed in this cause.

12. The Court erred in overruling the defendant's Motion to Strike the Complaint in this cause.

13. The Court erred in finding the defendant guilty of violating the laws or ordinances of the City of Birmingham,

Alabama, in that the laws or ordinances, under which this defendant was charged and convicted, and as applied to this defendant, constituted an abridgement of freedom of speech violative of rights and liberties secured to the defendant by the First and Fourteenth Amendments to the Constitution of the United States of America.

14. That the Court erred in refusing to find that the ordinance under which this defendant was being tried, as applied to this defendant, constituted a denial of the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States of America.

15. That the Court erred in finding the defendant guilty of violating the laws or ordinances of the City of Birmingham, Alabama, in that the laws or ordinances under which this defendant was charged and convicted, and as applied to this defendant, constituted a deprivation of liberty, without due process of law, in violation of the Constitution of the State of Alabama, and the provisions of the Fourteenth Amendment to the United States Constitution.

16. The Court erred in overruling defendant's Motion to exclude the evidence in this case.

17. That it appeared from the evidence that no owner of the premises involved, had caused the arrest and prosecution of the defendant, but that such arrest was procured by the officials of the City of Birmingham, Alabama, without first having a complaint from such owner, or other person in charge of such premises.

18. For that it appears from the evidence that the defendant was not prosecuted by the owner of private property, as provided for by the pertinent laws or ordinances of the City of Birmingham, but by police officials.

19. For that it appears from the evidence affirmatively that no owner or other person in charge of the premises involved, or otherwise, having authority to do so, procured the arrest of the defendant or signed a complaint or swore out a warrant against defendant for trespass on private property.

[fol. 11] 20. For that it affirmatively appears that the defendant was not requested to leave the premises of the store involved, but was only told to go elsewhere in said store.

Arthur D. Shores, Orzell Billingsley, Jr., Peter A. Hall, J. Richmond Pearson, Oscar W. Adams, Jr., Attorneys for Defendant.

ORDER OVERRULING

The foregoing Motion being presented in open Court, this the 11th day of October, 1960; the same being considered and understood, the Court is of the opinion that the same should be overruled.

It is therefore, Ordered, Adjudged and Decreed that the said Motion is hereby overruled.

George Lewis Bailes, Circuit Judge.

[File endorsement omitted]

---

[fol. 12]

COUNSEL'S NOTE RE RECORD

APPEAL BOND TO COURT OF APPEALS (omitted in printing).

(The parties hereby stipulate that the appeal bond in the *Billups* case is identical to that in the *Shuttlesworth* case, except for the names.)

---

[fol. 13]

**Transcript of Evidence—October 11, 1960**

[omitted in printing]

COUNSEL'S NOTE RE RECORD

(That the parties hereby stipulate that the transcript of the trial proceedings in the *Billups* case is identical to that in the *Shuttlesworth* case.)

[fol. 40] Reporter's and Clerk's Certificates to foregoing transcript (omitted in printing).

[fol. 42]

IN THE COURT OF APPEALS OF ALABAMA

---

CHARLES BILLUPS, Appellant,

vs.

THE CITY OF BIRMINGHAM, Appellee.

---

ASSIGNMENT OF ERRORS

The Appellant says that there is manifest error in the foregoing Transcript of the record of the proceedings had and done in the Honorable Circuit Court of Jefferson County, Alabama, to the hurt and prejudice of this appellant, and for error assigns each of the following separately and severally:

1. The Court erred in overruling Appellant's Motion to Strike, filed in this cause. (Tr. 2, 3, 7 & 14)

2. The Court erred in overruling Appellant's Demurrers filed in this cause. (Tr. 3, 4, 7 & 14)

3. The Court erred in overruling Appellant's Motion to Exclude the Evidence, filed in this cause. (Tr. 5, 6, 7 & 33)

4. The Court erred in overruling Appellant's Motion for a New Trial. (Tr. 9, 10, 11 & 39)

5. The Court erred in allowing Detective Charles L. Pierce, a Police Officer of the City of Birmingham, to testify as to his recollection of testimony given in the Recorder's Court of the City of Birmingham, by witnesses in the trial of this matter in aforesaid Recorder's Court. (Tr. 17-31)

Arthur D. Shores, Orzell Billingsley, Jr., Peter A. Hall, Oscar W. Adams, J. Richmond Pearson, Attorneys for Appellant.

[fol. 43] Certificate of Service (omitted in printing).

[fol. 44]

IN THE COURT OF APPEALS OF THE STATE OF ALABAMA

..... JUDICIAL DEPARTMENT

October Term, 1960-61

6 Div. 795

---

CHARLES BILLUPS,

v.

CITY OF BIRMINGHAM.

---

Appeal from Jefferson Circuit Court

November 2, 1960

Certificate Filed

January 26, 1961

Transcript Filed

April 18, 1961

Come the parties by attorneys, and argue and submit this cause for decision.

ORDER OF AFFIRMANCE—May 30, 1961

Come the parties by attorneys, and the record and matters therein assigned for errors being submitted on briefs and duly examined and understood by the court, it is considered that in the record and proceedings of the Circuit Court there is no error. It is therefore considered that the judgment of the Circuit Court be in all things affirmed. It is also considered that the appellant pay the costs of appeal of this court and of the Circuit Court.

[fol. 45]

IN THE COURT OF APPEALS OF THE STATE OF ALABAMA

.....JUDICIAL DEPARTMENT

October Term, 1960-61

6 Div. 795

---

CHARLES BILLUPS,

v.

CITY OF BIRMINGHAM.

---

Appeal from Jefferson Circuit Court

OPINION—May 30, 1961

PRICE, Judge

This is a companion case to that of F. L. Shuttlesworth v. City of Birmingham, 6 Div. 802.

The facts set out in the Shuttlesworth case are adopted as the facts of this case, with this additional statement: "On March 30, 1960, Rev. Billups went to Daniel Payne College, in a car, where he picked up one James Albert [fol. 46] Davis, a student, and carried him to the home of Rev. F. L. Shuttlesworth, where several people had gathered, among them Rev. Shuttlesworth, his wife, and several other students from Daniel Payne College. Rev. Billups was also at said meeting." Under this testimony the jury was fully justified in finding that this defendant was part and parcel of the entire scheme.

On the authority of Shuttlesworth v. City of Birmingham, supra, the judgment is due to be, and hereby is, affirmed.

Affirmed.

[fol. 47]

IN THE COURT OF APPEALS OF THE STATE OF ALABAMA

..... JUDICIAL DEPARTMENT

October Term, 1960-61

6 Div. 795

---

CHARLES BILLUPS,

v.

CITY OF BIRMINGHAM.

---

Appeal from Jefferson Circuit Court

APPLICATION FOR REHEARING—June 14, 1961

Now comes appellant, in the above styled cause, and respectfully moves this Honorable Court to granf appellant a rehearing in said cause, and to reverse, revise and hold for naught its Judgment rendered on, to-wit, the 30th day of May, 1961, and affirming the Judgment of the Circuit Court of Jefferson County, Alabama, and to enter an Order, reversing said Judgment.

Arthur D. Shores, Orzell Billingsley, Jr., Peter A. Hall, Oscar W. Adams, Jr., J. Richmond Pearson, Attorneys for Appellant.

ORDER OVERRULING—June 20, 1961

It is ordered that the application for rehearing be and the same is hereby overruled.

Per Curiam.

[fol. 47a] [File endorsement omitted]

IN THE SUPREME COURT OF ALABAMA,

SIXTH DIVISION

No. 763

EX PARTE: CHARLES BILLUPS

---

CHARLES BILLUPS, Appellant,

vs.

CITY OF BIRMINGHAM, Appellee.

---

Petition for Certiorari

Arthur D. Shores, Peter A. Hall, Orzell Billingsley, Jr., Oscar W. Adams, J. Richmond Pearson, Attorneys for Appellant.

PROCEEDINGS ON PETITION FOR CERTIORARI

July 5, 1961,—Submitted on Briefs

Sept. 25, 1961,—Writ denied No Opinion

Oct. 4, 1961,—Application for Rehearing filed

Nov. 16, 1961,—Application for Rehearing Overruled

[fol. 47b]

IN THE SUPREME COURT OF ALABAMA

SIXTH DIVISION

No. 763

EX PARTE: CHARLES BILLUPS

---

CHARLES BILLUPS, Appellant,

vs.

CITY OF BIRMINGHAM, Appellee.

---

PETITION FOR CERTIORARI—Filed July 5, 1961

[fol. 48]

To the Honorable Chief Justice and Associate Justice of the Supreme Court of Alabama

1. Comes the Appellant, by and through his Attorneys, Arthur D. Shores, Peter A. Hall, Orzell Billingsley, Jr., Oscar W. Adams, Jr., and J. Richmond Pearson, and respectfully petitions this Honorable Court to review, revise, reverse and hold for naught that certain judgment of the Court of Appeals, on to-wit: May 30, 1961, wherein Charles Billups was Appellant and the City of Birmingham was Appellee, which judgment affirms the Judgment of the Circuit Court of Jefferson County, Alabama.

2. Your petitioner avers that application to the Court of Appeals for a Rehearing of said cause and Brief in support thereof were duly filed by your petitioner within the time required by law, and that said application for rehearing was overruled by said Court of Appeals on the 20th day of June, 1961.

3. Your petitioner respectfully shows unto the Court that this cause arose from a complaint filed by the City of Birmingham, charging your petitioner as follows:

"Comes the City of Birmingham, Alabama, a municipal corporation, and complains that Charles Billups,

within twelve months before the beginning of this prosecution, and within the City of Birmingham or the police jurisdiction thereof, did incite or aid or abet in the violation of an ordinance of the city, to-wit, Section 1436 of the General City Code of Birmingham [fol. 49] of 1944, in that Charles Billups did incite or aid or abet another person to go or remain on the premises of another after being warned not to do so, contrary to and in violation of Section 824 of the General City Code of Birmingham of 1944."

4. Your petitioner filed a Motion to Quash the Complaint and Demurrers to the Complaint, on grounds that the Complaint was so vague and indefinite as not to apprise the Appellant of what he was called upon to defend, and further, that the ordinances which formed the basis of the prosecution, as applied to appellant, constituted an abridgement of the privileges and immunities guaranteed by the Constitution of the United States and that the ordinances were unconstitutional on their face.

5. The Court overruled the Motion to Quash and the Demurrers whereupon petitioner was tried without a jury, and was found guilty as charged, and fined Twenty-five ($25.00) Dollars and costs, and sentenced to a term of Thirty (30) days of hard labor for the City of Birmingham.

6. Your petitioner filed a Motion to Exclude the Evidence, at the close of the City's case, which Motion was denied. After judgment and sentences, petitioner filed a Motion for a New Trial, which Motion was denied, and petitioner perfected his appeal.

7. Your petitioner further shows unto Your Honors that the Court of Appeals erred in affirming and failing to reverse said cause, in the following ways, to-wit: The Court based its judgment in this cause upon the opinion judgment rendered in the case of James Albert Davis vs. City of Birmingham, Six Division—797, decided May 30, 1961.

8. That the Propositions of Law involved, which petitioner claims should be reviewed and revised by this Court, are as follows:

A. That the Ordinances and Complaint, the basis of the prosecution, are unconstitutional on their face, that they are so vague, indefinite and uncertain as to constitute a deprivation of liberty, without due process of law, in violation of the Fourteenth Amendment to the United States Constitution.

b. That the Ordinance and Complaint, the basis of the prosecution, as applied to petitioner, constitute an abridgement of the privileges and immunities, and a denial of the equal protection of the laws, all in violation of the Fourteenth Amendment of the United States Constitution. [fol. 50] The Court of Appeals erred in failing to rule that the conviction of petitioner was a violation of due process of law, an abridgement of the privileges and immunities of the petitioner, in that the petitioner was denied equal protection of the law, all in violation of the Fourteenth Amendment to the Constitution of the United States.

Wherefore, Your petitioner most respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Court, directed to the Court of Appeals of Alabama, commanding and requiring said Court to certify and send to this Court, on a day certain to be designated by this Court, a full and complete transcript of record, and all proceedings by said Court of Appeals of Alabama, in the Cause numbered and entitled aforesaid, to the end that this cause may be reviewed and determined by this Honorable Court, and that this Court thereupon proceed to review and correct the errors complained of and to reverse the Judgment of the Court of Appeals or render such Judgment as said Court should have rendered.

Petitioner prays that this Honorable Court suggest and require the Court of Appeals to Stay or recall its Certificate of Affirmance of said cause, during the pendency of this petition.

And petitioner prays for such other, further and additional relief in the premises as to this Court may seem

appropriate, and to which he may be entitled, and your petitioner will ever pray.

Respectfuly submitted,

Arthur D. Shores, Peter A. Hall, Orzell Billingsley, Jr., Oscar W. Adams, Jr., J. Richmond Pearson, by Orzell Billingsley, Jr., Attorneys for Appellant.

[fol. 51] *Duly sworn to by Orzell Billingsley, Jr., jurat omitted in printing.*

Certificate of Service (omitted in printing).

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[fol. 52]

IN THE SUPREME COURT OF ALABAMA

SIXTH DIVISION

No. 763

EX PARTE: CHARLES BILLUPS

---

CHARLES BILLUPS, Appellant,

vs.

CITY OF BIRMINGHAM, Appellee.

---

APPLICATION FOR REHEARING—Filed October 4, 1961

Now comes Appellant, in the above styled cause, and respectfully moves this Honorable Court to grant Appellant a Rehearing in said cause, and reverse, revise and hold for naught its Judgment rendered on to-wit, the 21st day of September, 1961, denying appellant the Writ of Certiorari and dismissing the petition, and to enter an Order reinstating appellant's petition, and directing that a Writ of Certiorari be issued out of and under the Seal of this Court, to the Court of Appeals of Alabama, to the end that this cause may be reviewed and determined by this Honorable Court.

Appellant further moves the Court to grant a Stay of Execution in this cause, during the pendency of this Application for a Rehearing.

Submitted herewith is a Brief and Argument, in support of said Motion.

Arthur D. Shores, Peter A. Hall, Orzell Billingsley, Jr., Oscar W. Adams, J. Richmond Pearson, Attorneys for Appellant, by Orzell Billingsley, Jr.

---

[fol. 53]

IN THE SUPREME COURT OF ALABAMA

The Court met pursuant to Adjournment

Present: All the Justices
(Lawson's Division Sitting)

6th Div. 763

EX PARTE: CHARLES BILLUPS, Petitioner

Petition for Writ of Certiorari to the Court of Appeals

---

RE: CHARLES BILLUPS,

v.

CITY OF BIRMINGHAM.

---

Jefferson Circuit Court

ORDER OVERRULING—November 16, 1961

It Is Hereby Ordered that the application for rehearing filed on October 4, 1961, be and the same is hereby overruled.

Livingston, C. J., Lawson, Stakely and Merrill, JJ., concur.

[fol. 54] Clerks' Certificates to foregoing transcript (omitted in printing).

[fol. 56]

SUPREME COURT OF THE UNITED STATES

No. 721, October Term, 1961

---

F. L. SHUTTLESWORTH, et al., Petitioners,

vs.

CITY OF BIRMINGHAM.

---

ORDER ALLOWING CERTIORARI—June 25, 1962

The petition herein for a writ of certiorari to the Court of Appeals of the State of Alabama is granted, and the case is transferred to the summary calendar. The case is set for argument to follow No. 694.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Frankfurter took no part in the consideration or decision of this petition.

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JOHN F. DAVIS, CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1961

No. [redacted] 67

F. L. SHUTTLESWORTH and CHARLES BILLUPS,

*Petitioners,*

—v.—

CITY OF BIRMINGHAM.

## PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF ALABAMA

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1961

No. .....

F. L. SHUTTLESWORTH and CHARLES BILLUPS,

*Petitioners,*

—v.—

CITY OF BIRMINGHAM.

## PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF ALABAMA

Petitioners pray that a writ of certiorari issue to review the judgments of the Court of Appeals of Alabama, rendered on May 30, 1961.

### Citation to Opinions Below

The opinions of the Alabama Court of Appeals are reported in 134 So. 2d 213 and 134 So. 2d 215 and are set forth in the Appendix hereto *infra*, pp. 1a, 2a and 8a. The denial of certiorari by the Supreme Court of Alabama is reported at 134 So. 2d 214 and 134 So. 2d 215.

### Jurisdiction

The judgments of the Alabama Court of Appeals were entered on May 30, 1961 (R. 44).* Appendix pp. 3a, 9a, *infra*.

* There are separate records for the *Shuttlesworth* and *Billups* cases. References to both records were made by a single citation where the page numbers are the same.

Application for rehearing before the Court of Appeals of Alabama was denied on June 20, 1961 (Shuttlesworth R. 48, 49; Billups R. 47). A petition to the Supreme Court of Alabama for Writ of Certiorari was denied on September 25, 1961, and application for rehearing was overruled on November 16, 1961 (Shuttlesworth page following R. 49; Billups, page following R. 47). The jurisdiction of this Court is invoked pursuant to 28 United States Code, §1257 (3), petitioners having asserted below, and asserting here, the deprivation of his rights, privileges and immunities secured by the Constitution of the United States.

## Question Presented

Alabama has convicted petitioners of "incit[ing] or aid-[ing] or abet[ting] another person to go or remain on the premises of another after being warned . . .". The record showed essentially that petitioner Shuttlesworth "asked for volunteers to participate in the sit-down demonstrations" and that petitioner Billups was present at this request. There was no evidence that either persuaded anyone to violate any law, or that anyone following petitioners' suggestions did violate any law, valid under the Fourteenth Amendment to the United States Constitution. A Birmingham ordinance requires racial segregation in restaurants.

In convicting and sentencing petitioners respectively to 180 and 30 days hard labor, plus fines, has Alabama denied liberty, including freedom of speech, secured by the due process clause of the Fourteenth Amendment?

## Constitutional and Statutory Provisions Involved

This case involves the following constitutional provision:

Section 1 of the Fourteenth Amendment to the Constitution of the United States.

The case also involves the following provisions of the General Code of Birmingham of 1944:

> "Section 824. It shall be unlawful for any person to incite, or aid or abet in, the violation of any law or ordinance of the city, or any provision of state law, the violation of which is a misdemeanor."
>
> "Section 1436 (1944), *After Warning.* Any person who enters into the dwelling house, or goes or remains on the premises of another, after being warned not to do so, shall on conviction, be punished as provided in Section 4, provided, that this Section shall not apply to police officers in the discharge of official duties."
>
> "Section 369 (1944), *Separation of races.* It shall be unlawful to conduct a restaurant or other place for the serving of food in the city, at which white and colored people are served in the same room, unless such white and colored persons are effectually separated by a solid partition extending from the floor upward to a distance of seven feet or higher, and unless a separate entrance from the street is provided for each compartment" (1930, Section 5288).

## Statement of the Case

These cases were tried in the Circuit Court of Jefferson County sitting without a jury (R. 13) on evidence given by a City of Birmingham detective who testified concerning what had been placed in evidence at the trial of petitioner

Shuttlesworth for this alleged crime in the City Recorder's Court, April 1, 1960. The record of the proceedings (R. 13-34) is for the greatest part taken up by objections to the hearsay nature of the evidence and objections to compelling testimony from defendants in the trespass cases themselves. (The former objections were overruled; the latter sustained.) The relevant testimony admitted into evidence is, however, extremely brief.

In summary, the evidence upon which petitioners Shuttlesworth and Billups were convicted of inciting, aiding or abetting another to go or remain on the premises of another after being warned not to do so was that one, James Gober and one, Albert Davis went to petitioner Rev. Shuttlesworth's house on March 30, 1960 (R. 25-26, 28-29), that petitioner Billups drove Davis there (R. 28), and that petitioner Billups was present (R. 2[illegible]), that petitioner Shuttlesworth asked for volunteers to participate in sit-down demonstrations (R. 25-26, 28-29), that a list, not otherwise described, was made (R. 28-29), that Shuttlesworth announced he would get them out of jail (R. 29), that Gober and Davis participated in sit-down demonstrations on March 31 (R. 30), and that others who attended the meeting at Shuttlesworth's house participated in sit-down demonstrations (R. 30-31). The record contains nothing more.*

On this record petitioner Shuttlesworth was found guilty as charged and sentenced to 180 days hard labor for the city, plus $100.00 fine. Petitioner Billups was found guilty as charged and sentenced to 30 days hard labor for the city and $25.00 fine.

---

* Extracts from the transcript are set forth verbatim in the Appendix, *infra*.

## How the Federal Questions Were Raised and Decided Below

After conviction in the Recorder's Court of the City of Birmingham, petitioners appealed to the Circuit Court of Jefferson County for trials *de novo*, prior to which they filed motions to strike the complaint and demurrers alleging that §824 and §1436 of the General City Code of Birmingham were applied to deprive them of freedom of assembly and speech under the Fourteenth Amendment; that as applied the ordinances were an enforcement of racial segregation and, therefore, a denial of due process and equal protection of laws, in violation of the Fourteenth Amendment; that the ordinances as applied were so vague as to constitute denial of due process of law in violation of the Fourteenth Amendment (R. 2-4).

The motions to strike and the demurrers were overruled; exceptions were taken (R. 7).

At the close of the State's evidence, petitioners moved to exclude the evidence alleging, among other things, that the trespass convictions (which petitioners allegedly had initiated) were invalid as based solely on race and, therefore, the complaint in this case was a denial of equal protection of the laws and the right of free speech and assembly secured by the Fourteenth Amendment; that the introduction of the proceedings in Recorder's Court through hearsay evidence constituted a violation of the petitioner's rights under the Fourteenth Amendment (R. 5, 6).

The motions to exclude the evidence were overruled and exception taken (R. 7).

At the end of the trial petitioners moved for new trials alleging, among other things, that: the ordinance under which they were convicted had been applied to deny free-

dom of speech, due process and equal protection of the laws in violation of the Fourteenth Amendment; that the Court erred in overruling the motion to strike the complaint, the demurrer, and the motion to exclude the evidence (R. 9-10).

The motions for new trial were overruled (R. 7-8).

Appeals were taken to the Alabama Court of Appeals and Assignments of Errors were filed against the action of the trial court in overruling the motion to strike the complaint (Assignment 1), the demurrers (Assignment 2), the motion to exclude the evidence (Assignment 3) and the motion for new trial (Assignment 4) (R. 42).

A full opinion was written by the Court of Appeals in *Shuttlesworth* v. *City of Birmingham*, 6 Division 802, (Shuttlesworth 45-47). In *Billups'* case after a brief reference to testimony thought to implicate him, his conviction was affirmed on the authority of *Shuttlesworth* (Billups 45, 46).

The Court ruled adversely to all constitutional issues raised by petitioners:

> "There is no question of the restriction of any right of free speech or other assimilated right derived from the Fourteenth Amendment, since the appellant counseled the college students not merely to ask service in a restaurant, but urged, convinced and arranged for them to remain on the premises presumably for an indefinite period of time. There is a great deal of analogy to the sit-down strikes in the automobile industry referred to in *National Labor Relations Board* v. *Fansteel Metallurgical Corp.*, 306 U. S. 240.
>
> "As presented by the appellant's assignments of error and brief, the judgment below is due to be
>
> AFFIRMED."

Applications for rehearing before the Court of Appeals were overruled (Shuttlesworth 48; Billups 47). Writs of Certiorari, sought in the Supreme Court of Alabama were denied (Shuttlesworth page after 49, Billups page after 47). Application for rehearing before the Supreme Court of Alabama were overruled (Shuttlesworth 55, Billups 53).

## Reasons for Granting the Writ

The court below decided federal constitutional propositions in conflict with decisions of this Court.

The conviction of petitioners and judgments sentencing them to hard labor in jail for 180 and 30 days respectively, denied them liberty secured by the due process clause of the Fourteenth Amendment to the United States Constitution. This liberty has been taken away solely because petitioners exercised Fourteenth Amendment rights of free speech and assembly. " . . . [F]reedom of speech, though not absolute, *Chaplinsky* v. *New Hampshire* . . . , is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest." *Terminiello* v. *Chicago*, 337 U. S. 1, 4. Petitioners are not charged with having conducted a meeting in an unlawful manner, *e.g.*, by sound truck (*Kovacs* v. *Cooper*; 336 U. S. 77) or without a permit where one was required, *Cox* v. *New Hampshire*, 312 U. S. 569, or under circumstances dangerous to public safety, e.g., *Feiner* v. *New York*, 340 U. S. 315, but cf. *Terminiello* v. *City of Chicago*, 337 U. S. 1, or to have spoken or met in a manner otherwise illegal. Neither have they been punished for crime for having created a clear and present danger of a substantive evil which the state has the power to prevent. Cf. *Schenck* v. *United States*, 249 U. S. 47.

In this case the record demonstrates merely that petitioner Shuttlesworth "asked for volunteers and that there were some volunteers to take part in 'sit-down' demonstrations; Shuttlesworth promised to get them out of jail" (Opinion of Alabama Court of Appeals, *Shuttlesworth* v. *City of Birmingham*, App. 1a). In the case of *Billups*, the record shows only that Billups drove a student to Shuttlesworth's home and attended the meeting at which Shuttlesworth made the request for "volunteers" (Opinion of Alabama Court of Appeals, *Billups* v. *City of Birmingham*, App. 6a). There is no evidence at all that Shuttlesworth requested anyone to perform an unlawful act. The Alabama Court of Appeals states that "the appellant counseled the college students not merely to ask service in a restaurant, but urged, convinced and arranged for them to remain on the premises *presumably* for an indefinite period of time" (App. 1a (emphasis supplied)). The Alabama Court of Appeals also held that a "sit-down" demonstration being a form of trespass after warning, denotes violation of State law and especially of §1436 of the City Code, *supra* (*ibid.*).

But the record does not at all support these conclusions. See *Thompson* v. *City of Louisville*, 326 U. S. 199.

Petitioner Shuttlesworth's request for volunteers to participate in sit-down demonstrations does not on this record in any sense at all support a conclusion that he "urged, convinced and arranged for them to remain on the premises presumably for an indefinite period of time." Nor does it support at all a conclusion that he asked them to engage in "trespass after warning." A "sit-down" demonstration may take many forms. See Pollitt, Duke L. J., *Dime Store Demonstrations: Events and Legal Problems of First Sixty Days*, 315 (1960). Such demonstrations are not at all necessarily a crime as this Court demonstrated by its decision

in *Garner* v. *Louisiana*, 7 L. ed. 207 (1961). Moreover, state courts under varying sets of facts have acquitted or reversed the convictions of participants in such demonstrations.

See Pollitt, *op. cit. supra*, at p. 350 (trespass convictions of students convicted in Raleigh, N. C. dismissed); *King* v. *City of Montgomery*, —— Ala. ——, 128 So. 2d 341 (trespass convictions for sit-in in private hotel reversed); *Briscoe* v. *State of Texas*, 341 So. 2d 432; *Rucker* v. *State of Texas*, 341 So. 2d 434; *Tucker* v. *State of Texas*, 341 So. 2d 433; *Johnson* v. *State of Texas*, 341 So. 2d 434 (convictions of sit-ins for unlawful assembly reversed).

There is no evidence in this record concerning precisely the activities petitioners are supposed to have counseled, and no evidence concerning the activities in which students are supposed to have engaged following petitioners' advice when they participated in sit-ins. But even if one were to notice, *arguendo*, the convictions of *Gober, et al.*, now here in No. 694 on Petition for Writ of Certiorari, it is respectfully submitted that the demonstrators in those cases committed no crimes but were engaged in activities protected by the Fourteenth Amendment to the United States Constitution. The request for nonsegregated service in the face of the Birmingham segregation ordinance did not constitute illegal activity by those students when viewed in the light of the Fourteenth Amendment to the United States Constitution[1] for the proprietors were compelled to refrain from serving those petitioners by the Ordinance.[2]

---

[1] Additional reasons demonstrating the unconstitutionality of the convictions in *Gober* are set forth in the petition in No. 694 to which petitioners here respectfully refer the Court.

[2] " 'Sec. 369. Separation of races.

It shall be unlawful to conduct a restaurant or other place for serving of food in the city, at which white and colored

Consequently any "trespass" that occurred stemmed directly from the segregation law. Such convictions obviously were unconstitutional.

Petitioners having met and expressed themselves in a manner which was entirely legal and having counseled activities which were entirely legal and concerning which there is no evidence whatsoever of illegality, were engaged in constitutionally protected free expression. Indeed, as Mr. Justice Harlan pointed out in his concurring opinion in *Garner*, a lawfully conducted sit-in protest is an exercise of First Amendment and (as against the states) Fourteenth Amendment rights. Counseling another to engage in such activity absent any evidence that illegal conduct is sought by the counsellor is *a fortiori* the exercise of free speech.[3] Here petitioners did not seek to achieve a sub-

---

people are served in the same room, unless such white and colored persons are effectually separated by a solid partition extending from the floor upward to a distance of seven feet or higher, and unless a separate entrance from the street is provided for each compartment' " (1930, §5288).

This ordinance is judicially noticeable by the Alabama courts, 7 Code of Alabama, 1940, §429(1). See *Shell Oil* v. *Edwards*, 263 Ala. 4, 9, 88 So. 2d 689 (1955); *Smiley* v. *City of Birmingham*, 255 Ala. 604, 605, 52 So. 2d 710 (1951). " 'The act approved June 18, 1943, requires that all courts of the State take judicial knowledge of the ordinances of the City of Birmingham.' " *Monk* v. *Birmingham*, 87 F. Supp. 538 (N. D. Ala. 1949), aff'd 185 F. 2d 859, cert. denied 341 U. S. 940. And this Court takes judicial notice of laws which the highest court of a state may notice. *Junction R.R. Co.* v. *Ashland Bank*, 12 Wall. (U. S.) 226, 230; *Abie State Bank* v. *Bryan*, 282 U. S. 765, 777, 778; *Adams* v. *Saenger*, 303 U. S. 59; *Owings* v. *Hull*, 9 Peters (U. S.) 607, 625.

[3] Compare *Fiske* v. *Kansas*, 274 U. S. 38, where the criminal syndicalism act was held to have been applied unconstitutionally where it was not shown that defendants had advocated unlawful methods to obtain their goals. In the case now at bar petitioners' goals were consonant with those of the high aspirations of the Fourteenth Amendment. Cf. *Railway Mail Ass'n* v. *Corsi*, 326 U. S. 88, 98 (Justice Frankfurter's concurring opinion).

stantive evil which the state has a right to prevent, see *Schenck* v. *United States*, 249 U. S. 47; rather, they sought nonsegregated food service in the face of an obviously unconstitutional racial segregation ordinance in the City of Birmingham which asserted a power the state does not possess.

Conviction of petitioners under the "inciting" ordinance is even further offensive to the Fourteenth Amendment because this ordinance does not reasonably apprise anyone that to advocate a sit-in protest is a crime. A statute must give fair warning to a defendant of what acts are prohibited, *Connally* v. *General Construction Co.*, 269 U. S. 385 and where it trenches upon free expression the statute must be even more specific. *Winters* v. *New York*, 333 U. S. 507; *Burstyn* v. *Wilson*, 343 U. S. 495; *Saia* v. *New York*, 334 U. S. 558; *Chaplinsky* v. *New Hampshire*, 315 U. S. 568.

WHEREFORE, for the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be granted.

Respectfully submitted,

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LEROY D. CLARK
JAMES M. NABRIT, III
*Of Counsel*

## APPENDIX

### Opinion of Cates, Presiding Judge

THE STATE OF ALABAMA—JUDICIAL DEPARTMENT

THE ALABAMA COURT OF APPEALS

October Term, 1960-61

6 Div. 802

F. L. SHUTTLESWORTH

—v.—

CITY OF BIRMINGHAM

Appeal from Jefferson Circuit Court

CATES, *Judge*:

Appellant was convicted in the Circuit Court of Jefferson County of violating § 824 of the General City Code of Birmingham of 1944, which reads as follows:

> "It shall be unlawful for any person to incite, or aid or abet in, the violation of any law or ordinance of the city, or any provision of state law, the violation of which is a misdemeanor."

The particular corollary crime of which he was accused of inciting others to commit is found in § 1436 of the City Code. This section makes it an offense to remain on the premises of another after a warning. See *James Gober* v. *City of Birmingham*, 6 Div. 797 (Ms.), —— Ala. App. ——, this day decided.

We can only consider one point raised by the assignments of error and the propositions of law and argument, i.e., the sufficiency of the evidence to show a violation of § 824, supra.

The statement of the case set forth in appellant's brief (which we are entitled to rely upon without regard to the record itself in civil cases) is that Shuttlesworth asked for volunteers, and that there were some volunteers to take part in, 'sit-down' demonstrations; Shuttlesworth promised to get them out of jail.

The appellant's argument on this point deliberately evades the effect of the word "incite" in the city ordinance, and deals solely with the joint responsibility of an aider and abetter. It is sufficient to answer this argument by a quotation from Jowitt's *Dictionary of English Law*, p. 953:

> "Everyone who incites any person to commit a crime is guilty of a common law misdemeanor, even though the crime is not committed. If the crime is actually committed, he is an accessory before the fact in the case of felony, and equally guilty, in the case of treason or misdemeanor, with the person who commits the crime."

A sit-down demonstration being a form of trespass after warning, denotes a violation of both State law and especially of § 1436 of the City Code, supra.

There is no question of the restriction of any right of free speech or other assimilated right derived from the Fourteenth Amendment, since the appellant counseled the college students not merely to ask service in a restaurant, but urged, convinced and arranged for them to remain on the premises presumably for an indefinite period of time. There is a great deal of analogy to the sit-down strikes in the automobile industry referred to in *National Labor Relations Board* v. *Fansteel Metallurgical Corp.*, 306 U. S. 240.

As presented by the appellant's assignments of error and brief, the judgment below is due to be

AFFIRMED.

## Order of Affirmance in Shuttlesworth Case

THE STATE OF ALABAMA—JUDICIAL DEPARTMENT

THE ALABAMA COURT OF APPEALS

October Term, 1960-61

6 Div. 802

F. L. SHUTTLESWORTH

—v.—

CITY OF BIRMINGHAM

Appeal from Jefferson Circuit Court

November 2, 1960

CERTIFICATE FILED

January 26, 1961

TRANSCRIPT FILED

April 18, 1961

Come the parties by attorneys, and argue and submit this cause for decision.

May 30, 1961

Come the parties by attorneys, and the record and matters therein assigned for errors being submitted on briefs and duly examined and understood by the court, it is considered that in the record and proceedings of the Circuit Court there is no error. It is therefore considered that the judgment of the Circuit Court be in all things affirmed. It is also considered that the appellant pay the costs of appeal of this court and of the Circuit Court.

## Order Denying Application for Rehearing in Shuttlesworth Case

THE STATE OF ALABAMA—JUDICIAL DEPARTMENT

THE ALABAMA COURT OF APPEALS

October Term, 1960-61

6 Div. 802

F. L. SHUTTLESWORTH

—v.—

CITY OF BIRMINGHAM

Appeal from Jefferson Circuit Court

June 14, 1961

Now comes appellant, in the above styled cause, and respectfully moves this Honorable Court to grant appellant a rehearing in said cause, and to reverse, revise and hold for naught its Judgment rendered on to-wit, the 30th day of May, 1961, and affirming the Judgment of the Circuit Court of Jefferson County, Alabama, and to enter an Order, reversing said Judgment.

ARTHUR D. SHORES
ORZELL BILLINGSLEY, JR.
PETER A. HALL
OSCAR W. ADAMS, JR.
J. RICHMOND PEARSON
*Attorneys for Appellant*

June 20, 1961

It is ordered that the application for rehearing be and the same is hereby overruled.

CATES, *Judge.*

*Order Denying Application for Rehearing in Shuttlesworth Case*

June 20, 1961

ON REHEARING

CATES, *Judge*:

The application for rehearing in this case is supported by a brief which contains two propositions of law, both of which are predicated on the appellant's having been convicted under § 1436 of the General City Code of Birmingham.

This appellant was convicted of inciting others to violate § 1436. The propositions accordingly have no bearing on the facts.

APPLICATION OVERRULED.

## Order of Filing in Shuttlesworth Case

SIXTH DIVISION

No. 764

EX PARTE F. L. SHUTTLESWORTH

IN THE SUPREME COURT OF ALABAMA

---

F. L. SHUTTLESWORTH

*Appellant*

CITY OF BIRMINGHAM

*Appellee*

---

ARTHUR D. SHORES
PETER A. HALL
ORZELL BILLINGSLEY, JR.
J. RICHMOND PEARSON
OSCAR W. ADAMS, JR.
*Attorneys for Appellant*

July 5, 1961

SUBMITTED ON BRIEFS

September 25, 1961

WRIT DENIED: NO OPINION

October 4, 1961

APPLICATION FOR REHEARING FILED

APPLICATION FOR REHEARING OVERRULED

November 16, 1961

## Order Denying Petition for Writ of Certiorari to the Court of Appeals in Shuttlesworth Case

THE SUPREME COURT OF ALABAMA

Thursday, November 16, 1961

The Court met pursuant to adjournment

Present: All the Justices

(Lawson's Division Sitting)

6th Div. 764

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Ex Parte:

F. L. SHUTTLESWORTH,

*Petitioner.*

---

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

(Re: F. L. SHUTTLESWORTH v. CITY OF BIRMINGHAM)
Jefferson Circuit Court

IT IS HEREBY ORDERED that the application for rehearing filed on October 4, 1961, be and the same is hereby overruled.

LIVINGSTON, *C.J.*, LAWSON, STAKELY and MERRILL, *JJ.*, concur.

## Opinion of Price, Presiding Judge in Billups Case

May 30, 1961

THE STATE OF ALABAMA—JUDICIAL DEPARTMENT

THE ALABAMA COURT OF APPEALS

October Term, 1960-61

6 Div. 795

---

CHARLES BILLUPS

—v.—

CITY OF BIRMINGHAM

---

Appeal from Jefferson Circuit Court

PRICE, *Judge*:

This is a companion case to that of F. L. Shuttlesworth v. City of Birmingham, 6 Div. 802.

The facts set out in the Shuttlesworth case are adopted as the facts of this case, with this additional statement: "On March 30, 1960, Rev. Billups went to Daniel Payne College in a car, where he picked up one James Albert Davis, a student, and carried him to the home of Rev. F. L. Shuttlesworth, where several people had gathered, among them Rev. Shuttlesworth, his wife, and several other students from Daniel Payne College. Rev. Billups was also at said meeting." Under this testimony the jury was fully justified in finding that this defendant was part and parcel of the entire scheme.

On the authority of Shuttlesworth v. City of Birmingham, supra, the judgment is due to be, and hereby is, affirmed.

AFFIRMED.

## Opinion in Billups Case

THE STATE OF ALABAMA—JUDICIAL DEPARTMENT

THE ALABAMA COURT OF APPEALS

October Term, 1960-61

6 Div. 795

CHARLES BILLUPS

—v.—

CITY OF BIRMINGHAM

Appeal from Jefferson Circuit Court

November 2, 1960

CERTIFICATE FILED

January 26, 1961

TRANSCRIPT FILED

April 18, 1961

Come the parties by attorneys, and argue and submit this cause for decision.

May 30, 1961

Come the parties by attorneys, and the record and matters therein assigned for errors being submitted on briefs and duly examined and understood by the court, it is considered that in the record and proceedings of the Circuit Court there is no error. It is therefore considered that the judgment of the Circuit Court be in all things affirmed. It is also considered that the appellant pay the costs of appeal of this court and of the Circuit Court.

## Order Denying Application for Rehearing in Billups Case

THE STATE OF ALABAMA—JUDICIAL DEPARTMENT

THE ALABAMA COURT OF APPEALS.

October Term, 1960-61

6 Div. 795

---

CHARLES BILLUPS

—v.—

CITY OF BIRMINGHAM

---

Appeal from Jefferson Circuit Court

June 14, 1961

Now comes appellant, in the above styled cause, and respectfully moves this Honorable Court to grant appellant a rehearing in said cause, and to reverse, revise and hold for naught its Judgment rendered on, to-wit, the 30th day of May, 1961, and affirming the Judgment of the Circuit Court of Jefferson County, Alabama, and to enter an Order, reversing said Judgment.

ARTHUR D. SHORES
ORZELL BILLINGSLEY, JR.
PETER A. HALL
OSCAR W. ADAMS, JR.
J. RICHMOND PEARSON

*Attorneys for Appellant*

June 20, 1961

It is ordered that the application for rehearing be and the same is hereby overruled.

PER CURIAM.

## Order of Filing in Billups Case

SIXTH DIVISION

No. 763

EX PARTE: CHARLES BILLUPS

IN THE SUPREME COURT OF ALABAMA

CHARLES BILLUPS

*Appellant*

—VS.—

CITY OF BIRMINGHAM

*Appellee*

ARTHUR D. SHORES
PETER A. HALL
ORZELL BILLINGSLEY, JR.
OSCAR W. ADAMS
J. RICHMOND PEARSON
*Attorneys for Appellant.*

July 5, 1961,—Submitted on Briefs

Sept. 25, 1961,—Writ denied: No opinion

Oct. 4, 1961,—Application for Rehearing filed

Nov. 16, 1961,—Application for Rehearing Overruled

**Order Denying Petition for Writ of Certiorari to the Court of Appeals in Billups Case**

THE SUPREME COURT OF ALABAMA

Thursday, November 16, 1961

The Court met pursuant to adjournment

Present: All the Justices

(Lawson's Division Sitting)

6th Div. 763

---

Ex Parte:

CHARLES BILLUPS,

*Petitioner*

---

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

(Re: CHARLES BILLUPS v. CITY OF BIRMINGHAM)
Jefferson Circuit Court

IT IS HEREBY ORDERED that the application for rehearing filed on October 4, 1961, be and the same is hereby overruled.

LIVINGSTON, *C.J.*, LAWSON, STAKELY and MERRILL, *JJ.*, concur.

**Extracts From Transcript of Proceedings***

"Q. Mr. [detective] Pierce, were you present in the City's Recorder's Court, the Honorable William Conway presiding, on the evening of April 1, 1960 at which time Rev. F. L. Shuttlesworth, or F. L. Shuttlesworth, was on trial for violation of a City Ordinance?

"A. Yes, sir, I was there.

"Q. On that occasion did a James Gober make any statement under oath and in the presence of the defendant Shuttlesworth, in the presence and hearing of the defendant Shuttlesworth, and in the presence and hearing of his counsel on that occasion?

"A. Yes sir, he did" (R. 17-18).

• • • • •

"The Court: May I inquire whether the witness heard James Gober in the presence of defendant Shuttlesworth say anything about where he had been the afternoon before or two days before, whether it was the 30th or 31st or the 1st of April" (R. 21)?

• • • • •

"A. I heard him testify that he was a student at Daniel Payne College" (R. 21).

• • • • •

"Q. Did he say where that place was on March 30th he went (R. 25)?

"A. He said he went to Rev. Shuttlesworth's house.

"Q. Did he make any remarks as to who was present when he arrived at Rev. Shuttlesworth's house?

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* This constitutes all of the testimony introduced in evidence except for material which is repetitive or introductory.

"A. He said there were several people present. He named Rev. Shuttlesworth and the Rev. Billups. Said they were there.

"Q. Did he mention that either Rev. Shuttlesworth or Rev. Billups made any statement there on that occasion?"

• • • • •

"A. He testified that the sit-down demonstrations was discussed at the meeting.

"Q. Did he state whether or not Rev. Shuttlesworth participated in that discussion of the sit down demonstration?

"A. He testified the meeting was in the living room of Rev. Shuttlesworth's house and that Rev. Shuttlesworth participated in the discussion about the sit-down demonstrations" (R. 25-26).

• • • • •

"Q. Did the witness say that Shuttlesworth sought volunteers for this demonstration, this sit in demonstration?"

• • • • •

"A. He testified that Rev. Shuttlesworth asked for volunteers to participate in the sit-down demonstrations (R. 26).

"Q. Did I understand you correct, Mr. Pierce, to say that he stated Rev. Billups was there at this meeting also?"

• • • • •

"A. He stated that Rev. Billups was there in the meeting (R. 27).

"Q. Did he make any reference to any list being made at this meeting held at Rev. Shuttlesworth's house?

"A. He did."

• • • • •

"A. He testified that there was a list made but he didn't know who made the list."

• • • • •

"Q. I will ask you, Mr. Pierce, if on this same evening of April, 1960 in the presence and hearing of Rev. Shuttlesworth and Rev. Billups if James Albert Davis, while under oath, made any statements concerning this meeting held at Rev. Shuttlesworth's house". (R. 28)?

• • • • •

"A. He did.

"Q. Will you tell the Court what, if anything, he said on this occasion that took place at the house of Rev. Shuttlesworth at this hearing or discussion wherein both Rev. Shuttlesworth and Rev. Billups were present."

• • • • •

"A. He testified that Rev. Billups came to his school, Daniel Payne College, in a car and carried him to Rev. Shuttlesworth's house. He further testified that when he arrived there there were several people there, among which was Rev. Shuttlesworth and Rev. Shuttlesworth's wife and a number of other students from Daniel Payne College. He testified that in response to Rev. Shuttlesworth asking for volunteers to participate in the sit-down strikes that he volunteered to go to Pizitz at 10:30 and take part in the sit-down demonstrations. He further testified that a list was made but he didn't know who made the list. He thought the list was compiled by—" (R. 28-29).

• • • • •

"A. He said he didn't know or wasn't sure who made the list and he testified that Rev. Shuttlesworth didn't say that he would furnish Counsel but told him or made

the announcement at that time that he would get them out of jail."

• • • • •

"Q. Do you know it to be a fact that a number of boys—or I will put it this way. Do you know it to be a fact that James Gober and James Albert Davis did participate in sit-down or sit-in demonstrations on the day of March 31, 1960 (R. 30)?

"A. Yes sir, they did.

"Q. Do you know of your own knowledge that other colored boys on that same date participated in sit-in demonstrations in down town stores in the City of Birmingham?"

• • • • •

"Q. Let me put it this way. Other boys who attended the meeting at Rev. Shuttlesworth's house?"

• • • • •

"A. Yes" (R. 30).

• • • • •

"Q. Did either Gober or Davis while at that Court hearing and under the conditions we have previously outlined state that other persons were present—I am speaking of in the Court room now—did they state that other persons were present who did participate in these demonstrations at Rev. Shuttlesworth's house on March 30, 1960?

"A. Yes sir" (R. 31).

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# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1962

No. 67

F. L. SHUTTLESWORTH and CHARLES BILLUPS,
Petitioners,

vs.

CITY OF BIRMINGHAM,
Respondent.

## BRIEF

On Behalf of Respondent to Petition for Writ of Certiorari.

WATTS E. DAVIS,
WILLIAM C. WALKER,
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Birmingham, Alabama,
Attorneys for Respondent.

St. Louis Law Printing Co., Inc., 415 N. Eighth Street. CEntral 1-6477.

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# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1961.

No. 721.

F. L. SHUTTLESWORTH and CHARLES BILLUPS,
Petitioners,

vs.

CITY OF BIRMINGHAM,
Respondent.

## BRIEF

**On Behalf of Respondent to Petition for Writ of Certiorari.**

### STATEMENT IN OPPOSITION TO QUESTION PRESENTED FOR REVIEW.

Petitioners present a single question for the review of this Court (p. 2).*

* Page references contained herein and preceded by the letter "p" designate pages in petitioners' Petitions for Writ of Certiorari. Page references contained herein and preceded by the letter "R" refer to pages in the *Records* of the proceedings below, which Records have common page numbers.

This question is predicated upon the supposition that "Alabama has convicted petitioners" of inciting or aiding or abetting another to go or remain on the premises of another after being warned not to do so.

Petitioners then propose for review by the Court the question of whether, in convicting and sentencing the petitioners, "has Alabama denied liberty, including free speech, secured by the due process clause of the Fourteenth Amendment?"

The State of Alabama is not a named party in the case, and so far as City of Birmingham, the respondent named in this cause, is aware, no effort has been exerted at any time to make the State of Alabama a party. Since "Alabama" was not a party to the case below, and is not a named party before this Court, the sole question presented here for review seems entirely and completely **moot** and **ungermane**, leaving thereby no question related to any events taking place in the courts below for review by this Court. The case below was a quasi-criminal proceeding wherein the City of Birmingham sought to enforce one of its local ordinances.

Petitioners take occasion to also predicate their question presented for review (p. 2) upon the hypothesis that "a Birmingham ordinance requires racial segregation in restaurants."

The petitioners' reference to such an alleged ordinance is mentioned here before this Court for the **very first time** since the initial filing of the complaint by respondent in the county circuit court below, and is not an appropriate matter to be considered here under a petition seeking writ of certiorari.

## STATEMENT IN OPPOSITION TO CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

Petitioners contend that a section 369 of the 1944 General Code of City of Birmingham is one of three ordinances involved in this proceeding.

As mentioned above, this alleged ordinance has been injected into this case for its first and only time in the petition for writ now before this Court, and is not a proper subject for consideration by the Court. The petition for writ of certiorari should seek only a review of what has transpired below and is not properly an arena for introducing new defenses which were not exhausted in the state courts.

## STATEMENT IN OPPOSITION TO PETITIONERS' STATEMENT OF THE CASE.

Respondent wishes to supplement petitioners' statement of the case by pointing out to the Court additional pertinent testimony which, though brief, is not in petitioners' statement:

> ". . . Rev. Billups came to his school, Daniel Payne College, in a car and carried him (Davis) to Rev. Shuttlesworth's house" (R. 28).

The record further shows "that in response to Rev. Shuttlesworth asking for volunteers to participate in the sit down strikes that he (Davis) volunteered to go to Pizitz at 10:30 and take part in the sit down demonstrations" (R. 29).

As noted by petitioners, Billups was present at the meeting and others in attendance at the meeting at Rev. Shuttlesworth's house participated in sit down demonstrations the day following the meeting (p. 4).

## ARGUMENT.

### Re: Lack of Jurisdiction of the Court.

Respondent insists the Court is without jurisdiction to entertain the "petition for writ of certiorari" in this cause, for that the petition was not served upon either of the counsel of record for respondent, namely, Watts E. Davis or Bill Walker, later referred to as William C. Walker, whose names clearly appear upon the face of the title pages appearing in each of the respective records now before the Court in this cause as the only counsel of record.

These two cases below, before the Alabama Court of Appeals, are reported respectively in 134 So. 2d 213 and 134 So. 2d 215; and, before the Supreme Court of Alabama, in 134 So. 2d 214 and 134 So. 2d 215. Each of the four reported cases show "Watts E. Davis and William C. Walker for Appellee".

The proof of service, Form 75 (8-61-10M), as supplied by the Clerk and subsequently filed with the Clerk of this Court, demonstrates clearly that notice of the filing of the petition, the record and proceedings and opinion of the Court of Appeals of Alabama and of the Supreme Court of Alabama, was served upon "Hon. MacDonald Gallion, Mr. James M. Breckenridge". Service of the notice, which is required by **Supreme Court Rule 21 (1)**, 28 U. S. C. A.,[1] to be made as required by **Supreme Court Rule 33 (1)**, 28 U. S. C. A.,[2] was attempted to be accomplished by use of

[1] The pertinent provision of Supreme Court Rule 21 (1) reads, "Review on writ of certiorari shall be sought by filing with the clerk, with proof of service as required by Rule 33, forty printed copies of a petition. . . ."

[2] The pertinent provision of Supreme Court Rule 33 reads, "Whenever any pleading, motion, notice, brief or other document is required by these rules to be served, such service may be made per-

the mail. **Supreme Court Rule 33 (1)**, 28 U. S. C. A., requires that **service by mail shall be addressed to counsel of record** (emphasis supplied) at his postoffice address, which, as shown supra, was not done in this case.

It is your respondent's position that the petitioners' failure to comply with the reasonable rules of this Court in the above regard, whether done through carelessness or indifference to the rules of this Court, leaves the respondent without notice of the proceedings pending in this cause, as required by law, and that the Court is without jurisdiction to proceed without the necessary parties to the writ before the Court. The petition for writ seeking certiorari should therefore be dismissed or denied.

The rules of this Court, **Supreme Court Rule 24 (2)**,[3] 28 U. S. C. A., do not provide for a separate motion to dismiss a petition for writ of certiorari, and absent the remedy of any such motion, respondent prays that nothing contained in its reply brief shall be considered as a waiver of its objection presented here to the **jurisdiction of the Court**.

## ARGUMENT.

### Re: Constitutional and Statutory Provisions Involved.

It is contended by petitioners that "Section 369 (1944)" of the respondent's city code is involved in the case now before the Court.

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sonally or by mail on each adverse party. If personal, it shall consist of delivery, at the office of counsel of record, to counsel or a clerk therein. If by mail, it shall consist of depositing the same in a United States post office or mail box, with first class postage prepaid, addressed to counsel of record at his post office address

[3] "No motion by a respondent to dismiss a petition for writ of certiorari will be received. Objections to the jurisdiction of the court to grant writs of certiorari may be included in briefs in opposition to petitions therefor."

Petitioners contend that the ordinance requires the separation of white and colored persons in eating establishments.

Assuming such to be true, the propriety of suggesting the ordinance for the **first time** in this Court is completely out of harmony with past decisions of this Court. In the case of **Local No. 8-6, Oil, Chemical and Atomic Workers International Union, AFL-CIO v. Missouri,** 80 S. Ct. 391, 361 U. S. 363, 4 L. Ed. 2d 373, this Court said, "Constitutional questions will not be dealt with abstractly. * * * They will be dealt with only as they are appropriately raised upon a record before us. * * * Nor will we assume in advance that a State will so construe its law as to bring it into conflict with the federal Constitution or an act of Congress." The foregoing quote was adopted from the earlier case decided by this Court in **Allen-Bradley Local, etc. v. Wisconsin Employment Relations Board,** 315 U. S. 740, at page 746, 62 S. Ct. 820, at page 824, 86 L. Ed. 1154.

It has been stated under **Alabama Supreme Court Rule 1, Code of Alabama (1940), Title 7, Appendix,** in assigning error on appeal, "it shall be sufficient to state concisely, in writing, in what the error consists".

It has been uniformly held under Alabama Supreme Court decisions that "no question is reserved for decision which is not embraced in a due assignment of error". **Holle v. Brooks,** 209 Ala. 486, 96 So. 341; **Swinea v. Florence,** 28 Ala. App. 332, 183 So. 686; **Crane v. Pearson,** 26 Ala. App. 571, 163 So. 821.

This Court has many times repeated its established doctrine that, "A decision of a state court resting on grounds of state procedure does not present a federal question." **Thorington v. Montgomery,** 13 S. Ct. 394, 147 U. S. 490, 37 L. Ed. 252; **McNulty v. California,** 13 S. Ct. 959, 149 U. S. 645, 37 L. Ed. 882; **O'Neil v. Vermont,** 12 S. Ct.

693, 144 U. S. 323, 36 L. Ed. 450; **Gibson v. Mississippi**, 16 S. Ct. 904, 162 U. S. 565, 40 L. Ed. 1075.

The records before this Court clearly show that petitioners have never placed before the **state courts** the matter of any such ordinance requiring separation of the races although lengthy and detailed pleadings were interspersed throughout all of the student sit-in cases (**Gober et al.**, now here in No. 694), as well as the instant case.

At best, as argued in the **Gober** case, the question of judicial notice by the court below might conceivably find its way into the controversy.

Bearing in mind that **judicial notice is a rule of evidence** rather than a **rule of pleading**, the suggested ordinance, to have served some defensive purpose (see **Code of Alabama (1940), Title 7, Section 225**), would of necessity have had to be incorporated into a plea or answer to the complaint. If then, after the supposed ordinance was properly made an issue in the trial below petitioners sought judicial notice by the Court, rules of **evidence** making it unnecessary to prove by evidence the existence of such an ordinance would have been entirely applicable. The record before the Court clearly demonstrates, of course, that petitioners did not place the question of such ordinance before the lower court, nor was any **assignment of error** directed to the proposition before the state appellate court.

This question is not a new one for this Court. In the recent case of **Garner v. State of Louisiana**, 82 S. Ct. (1961), Mr. Chief Justice Warren, in delivering this Court's opinion, stated, "There is nothing in the records to indicate that the trial judge did in fact take judicial notice of anything. To extend the doctrine of judicial notice to the length pressed by respondent * * * would be 'to turn the doctrine into a pretext for dispensing with a trial' ", citing **Ohio Bell Telephone Co. v. Public Utilities**

**Commission**, 301 U. S. 292, 302; 57 S. Ct. 724, 729, 81 L. Ed. 1093. The foregoing opinion further recited the inherent danger of a court taking upon itself the prerogative of unsolicited judicial notice in the absence of inserting same into the record by saying a party, "* * * is deprived of an opportunity to challenge the deductions drawn from such notice or to dispute the notoriety or truth of the facts allegedly relied upon."

In light of the **Garner opinion**, supra, and in light of the fact that the record discloses nowhere that the court below, either upon solicitation of counsel or otherwise, took or refused to take judicial notice of any such ordinance, and further, that no assignment of error before the state appellate court makes any reference whatever to the existence of such an ordinance, thereby affording the state appellate court an opportunity to rule on any question related to the ordinance, your respondent respectfully urges that no constitutional or other questions dependent upon such an ordinance are properly presentable before this Court for review.

## ARGUMENT.

### Re: Question Presented.

Petitioners submit one question for review (p. 2) by this Court.

The question is predicated upon the assumption of fact that "Alabama has convicted petitioners" for inciting, aiding or abetting another person to remain upon the premises of another after being warned not to do so; and upon the further assumption of fact that there was no evidence that either of the petitioners "persuaded anyone to violate any law" (ibid).

Following the foregoing assumptions of fact, petitioners present for review the following question:

> "In convicting and sentencing petitioners respectively to 180 and 30 days hard labor, plus fines, has Alabama denied liberty, including freedom of speech, secured by the due process clause of the Fourteenth Amendment?"

The City of Birmingham was the plaintiff in the trial court below (R. 2). The City handled the prosecution of the petitioners in the trial court and represented the city in the appellate courts of Alabama. So far as the record discloses, and so far as the respondent is aware, the State of Alabama has never been a party to any phase of this proceeding nor has the State of Alabama at any time interceded in the matter in any manner disclosed by the record. It would therefore appear that the only question presented to this Court for review is a moot one.

As to the proposition that there was "no evidence" (p. 2) to support the conviction of petitioners, your respondent is unwilling to concede this to be true.

The testimony offered by respondents in the trial below was neither disputed by petitioners nor was same subjected to any cross-examination (R. 31).

Petitioners present extracts of the testimony below in Appendix to their petition (pp. 13a-16a). In brief, the evidence is shown to be as follows: A student (Golber) went to Rev. Shuttlesworth's house on March 30th (p. 13a); a student (Davis) went to the house with Rev. Billups, who came to his school in a car and carried him there (p. 15a); Rev. Shuttlesworth and Rev. Billups were both present at Rev. Shuttlesworth's house (p. 14a); that there was a meeting in the living room and that Rev. Shuttlesworth participated in the discussion about sit-down demonstrations and Rev. Billups was at this meeting also (ibid); that when the student (Davis) arrived at the meeting there were several people there including

Rev. Shuttlesworth and a number of other students (p. 15a); Rev. Shuttlesworth asked for volunteers to participate in the sit-down strikes (ibid); a student (Davis) volunteered to go to Pizitz (a department store in the City of Birmingham) at 10:30 and take part in the sit-down demonstrations (ibid); that Rev. Shuttlesworth announced at that time that he would get them out of jail (pp. 15a, 16a); both James Albert Davis and James Gober did participate in sit-down demonstrations on March 31, 1960, as well as other students who attended the meeting at Rev. Shuttlesworth's house on March 30, 1960 (p. 16a).

The foregoing is the evidence contained in the record before the Alabama Court of Appeals, and in the petition under consideration.

The opinion of the state court of appeals (pp. 1a, 2a) stated (p. 2a), "A sit-down demonstration being a form of trespass after warning, denotes a violation of both State law and especially of Section 1436 of the City Code, supra. * * * There is a great deal of analogy to the sit-down strikes in the automobile industry referred to in **National Labor Relations Board v. Fansteel Metallurgical Corp.**, 306 U. S. 240."

Mr. Chief Justice Warren, in the Court's opinion in **Garner v. State of Louisiana**, 82 S. Ct. 248, 253 (1961), stated, "We of course are bound by a state's interpretation of its own statute and will not substitute our judgment for that of the state's when it becomes necessary to analyze the evidence for the purpose of determining whether that evidence supports the findings of a state court."

The gravamen of the offense (City Code, Section 824) charged against petitioners was that petitioners incited, aided or abetted another to violate the city law or ordinance. The law or ordinance which petitioners were

charged with inciting another to violate was Section 1436 of the City Code, which latter section makes it unlawful to remain on the premises of another after warning not to do so.

The evident objective of Section 824 of the City Code was the curtailment of City law violations by making it unlawful to incite or assist others to violate city laws.

While there has been no occasion for the Alabama appellate courts to interpret Section 824 of the City's Code, a very similar state statute, **Section 14 of Title 14, Code of Alabama, 1940,** contains an aiding and abetting statute very similar to the city's law, which says in part as follows: "* * * And all persons concerned in the commission of a crime, whether they directly commit the act constituting the offense, **or aid or abet** (emphasis supplied) its commission, though not present, must hereafter be indicted, tried and punished as principals, as in the case of misdemeanors."

The foregoing state statute has been construed by the state courts on many occasions. **Davis v. State,** 36 Ala. App. 573, 62 So. 2d 224, states, "The words 'aid and abet' comprehend all assistance rendered by acts or words of encouragement or support. . . . **Nor is it necessary to show prearrangement to do the specific wrong complained of.**" (Emphasis supplied.)

In **Pruett v. State,** 33 Ala. App. 491, 35 So. 2d 115, the court said, "Aid and abet comprehend all assistance rendered by acts or words of encouragement * * *", citing **Jones v. State,** 174 Ala. 53, 57 So. 31, 32.

Alabama has further ruled, "The participation in a crime and the community of purpose of the perpetrators need not be proved by direct or positive testimony, but may be inferred from circumstantial evidence." **Parsons v. State,** 33 Ala. App. 309, 33 So. 2d 164.

While the state statute differs from the city law primarily in the fact that the word "incite" is not found in the state statute, the net effect of the inclusion of the word "incite" in the city law could do no less than strengthen and enlarge the scope of the city's law.

The salient features of the state decisions, supra, are that **acts or words of encouragement** are sufficient to bring an offender within the scope of the statute; that it is not necessary to show prearrangement to do the **specific wrong complained of**; and that the community of purpose may be inferred from **circumstantial evidence.**

As to whether there is **any** evidence in the record to disclose that petitioners did incite or aid others to violate a city law, the petition admits in a summary of the evidence (p. 4), and in appendix (p. 14a), that a meeting was held at the home of Rev. Shuttlesworth; that Rev. Billups had driven one student to the meeting and was present during the meeting (p. 15a), at which meeting other students were in attendance, and that after one student volunteered to go to Pizitz at a certain hour, a list was made (ibid). The sit-downs were discussed at the meeting (p. 14a); Rev. Shuttlesworth made the announcement "that he would get them out of jail" (p. 16a), and that other students at the meeting participated in the sit-downs (ibid).

It is most difficult in view of the foregoing evidence to agree with petitioners' predicate of fact, upon which they base their one question for review by this Court (p. 2), namely, that there was "no evidence" upon which to rest the convictions of the petitioners in the trial court below. Every conceivable element of the offense of **inciting** the students to go upon the premises of another and participate in sit-downs is established by the evidence as admitted in the petition (supra) and as shown in the record. The sit-downs were prearranged, volunteers were sought, and the volunteers were promised they would be released

from jail. No other rational inference could be drawn from the promise of **release from jail** than that the volunteers were to continue their sit-downs on the premises of others until they were arrested for trespass, for under the respondent's general City Code there was no other punitive provision in the code under which they could be arrested and jailed. Petitioners assert the respondent has a segregation ordinance, which is copied into their petition as Section 369 (144) (p. 3), which has already been discussed here at length, which petitioners say requires restaurant owners or operators to make certain provisions for separation of the races in their eating establishments. Certainly the students could not have been arrested under any such ordinance as this, for, as shown in the petition (ibid), it only proposes a burden upon the person who **"conducts"** the restaurant and imposes no sanction or penalty upon would be customers in the eating establishments. There is no evidence in the record that the students were boisterous or obtrusive in their conduct so as to create a breach of the peace.

The solicitation of Rev. Shuttlesworth for volunteers for the sit-downs and the promise to get them out of jail (supra) left the state court no alternate but to reasonably conclude from the evidence that the sit-down demonstrators were to trespass and be arrested.

In **Thompson v. City of Louisville**, 80 S. Ct. 624, 625 (1960), cited by petitioners, this Court said, "Decision on this question turns not on the sufficiency of the evidence, but on whether this conviction rests upon any evidence at all."

In view of the evidence above outlined, the attempt by petitioners to parallel the instant case with the **Thompson case**, supra, appears highly incongruous.

It must also be remembered that the same trial court which rendered judgment against these two petitioners had

before it for consideration and the rendition of judgment, ten cases involving trespasses committed by the sit-down demonstrators who were counseled by Rev. Shuttlesworth, all of whom were sentenced together with these petitioners in a common sentencing proceeding (R. 35-39). The ten cases (**Gober et al.**, now here in No. 694), involving trespass after warning, together with the two instant cases, all involved common counsel and developed out of near identical circumstances occurring in different stores. If, indeed, the trial court had no knowledge or concept of the meaning of the term "sit-down demonstration", after having just completed hearing ten cases involving nothing but "sit-down" cases, it would of necessity have to be assumed that the trial judge was something more than naive. In context with the promised release from jail (pp. 4, 15a, 16a), there was only one inescapable interpretation which the trial court could place upon the term "sit-down demonstrations" and that was—a device of remaining on another's premises after being told to leave, as in **Fansteel**, supra.

Not to be overlooked is the matter of **how the question of the sufficiency of the evidence was raised in the state court.** Petitioners' motion to exclude the evidence, ground No. 4 (R. 6), in attacking the sufficiency of the evidence, alleged as follows:

> "4. The evidence against the defendant, a Negro, in support of the charge of his violation of 824 the General City Code of Birmingham of 1944, **clearly indicates** (emphasis supplied) that those persons alleged to have acted as a result of the aiding and abetting of the defendant, had accepted an invitation to enter and purchase articles in the various department stores in the City of Birmingham, stores open to the public, but had not been allowed to obtain food service on the same basis as that offered white persons, be-

> cause of their race or color; and, that in furtherance of this racially discriminatory practice of the **various department stores** (emphasis supplied) in the City of Birmingham, the defendant was arrested. * * *"

In the foregoing motion to exclude the evidence (R. 6), which motion is not reviewable by the state appellate court, **Dudley Brothers Lumber Company v. Long,** 109 So. 2d 684, 268 Ala. 565, the petitioners themselves have interpreted the evidence in the trial below as being inclusive of the activities of the demonstrators in the department stores, in adopting the language (R. 6), "The evidence against the defendant(s), a Negro, in support of the charge of violation of 824 the General City Code of Birmingham of 1944, **clearly indicates** (emphasis supplied) that those persons alleged to have acted as a result of the aiding and abetting of the defendant(s) had accepted an invitation to enter and purchase articles in the various department stores * * *", etc., and proceeds then to state that because of the discrimination of the **"various department stores"** the defendants were subsequently arrested (ibid).

In conclusion, on the subject of whether there was "any evidence", **Garner** and **Thompson, supra,** to support the state court's finding of guilt, your respondent strongly urges that every element of the offense of violating Section 824 of the General City Code of Birmingham of 1944 has been more than adequately substantiated by the evidence presented below as shown in the record and petition. To hold that there was **no evidence,** as contended by petitioners, to support the conviction would, as stated by Mr. Justice Harlan in **Garner v. State of Louisiana,** 82 S. Ct. 248, 265, "* * * in effect attribute(s) to the (Louisiana) Supreme Court a deliberately unconstitutional decision * * *".

## ARGUMENT.

### Re: Petitioners' Reasons for Granting the Writ.

Petitioners' argument concerning reasons for granting the writ should, of course, be confined to their "Question Presented" (p. 2) for the review of the Court, the substance of which is, "* * * has Alabama denied liberty, including freedom of speech, secured by the due process clause of the Fourteenth Amendment?"

For very obvious reasons, petitioners have not elaborated upon the **rights of property owners** as guaranteed under the Fifth and Fourteenth Amendments to the Constitution.

Petitioners concede that the doctrine of free speech protection has many limitations and cite well known authority in support thereof (p. 7), perhaps the most famous of which is **Schenck v. United States**, 249 U. S. 47. As the Court well knows, the defendant in this case was convicted for mailing circulars during World War I, which circulars were found to be detrimental to this country's war effort. On the circular, among other things, were the words, "Assert Your Rights", and described arguments in support of the war effort "as coming from cunning politicians." The right of free speech was not upheld by this Court because a danger to the substantive rights of others was involved.

In the instant cases, petitioners claim they were asserting their rights in seeking volunteers to test the substantive rights of private property owners, or, as they express it, to perform "sit-down demonstrations" (p. 8), which are commonly known to be a sitting upon the premises of another and refusing to leave until they become trespassers and are arrested. Rev. Shuttles-

worth's promise to free the demonstrators from jail conclusively establishes this fact. Attention is also invited to this fact as borne out in the ten cases involving the demonstrators now here in **Gober, et al.**, before the Court under No. 694. The demonstrators in **Gober** (Parker, R. 21; West, R. 18) said "they were not going to leave"; a demonstrator (Gober, R. 39; Davis, R. 40) was quoted as saying "they were instructed to go into the store and sit down at a white lunch counter, and that they would probably be or would be asked to leave, and not to leave but remain there until the police arrested them and took them out"; an assistant store manager (Parker, R. 23; West, R. 20) quoted demonstrators as saying, "We have our rights," when told to leave.

The inciting of this type of demeanor is what petitioners refer to as "constitutionally protected free expression" (p. 10).

This Court made it clear in **Martin v. Struthers**, 319 U. S. 147, 63 S. Ct. 862, 87 L. Ed. 1313, that, "Traditionally the American law punishes persons who enter onto the property of another after having been warned to keep off."

In **Browder v. Gayle**, 142 F. Supp. 707, it is clearly stated that individuals may elect persons with whom they will do business unimpaired by the Fourteenth Amendment.

The case of **Williams v. Howard Johnson**, 268 F. 2d 845, states clearly that restaurants not involved in interstate commerce are "at liberty to deal only with such persons as it may elect."

In the case of **Bullock v. U. S.**, 265 F. 2d 683; **cert. denied** 79 S. Ct. 1294, 1452, 360 U. S. 909, 932, 3 L. Ed. 2d 1260; **rehearing denied**, 80 S. Ct. 46, 361 U. S. 855, 4 L. Ed. 2d 95, it was emphasized that, "The right of free speech is not absolute and **this amendment to the Federal Constitution**

**does not confer the right to persuade others to violate the law.**" (Emphasis supplied.)

The evident intent in the meeting sponsored and participated in by Rev. Billups and Rev. Shuttlesworth was to determine whether private ownership and control of property was to endure in this country or whether the power of a large minority political block could overrule this traditional heritage of a free enterprise system.

Protection of one's property under the Fifth and Fourteenth Amendments are "**substantive**" rights and any threat to this substantive right presents a "clear and present danger." **Schenck v. United States**, supra.

Whatever may or may not be morally right in the use of one's own property, sit-down demonstrations have no place there if not consented to by the owner, as stated in **Garner**, supra, in the opinion delivered by Mr. Justice Harlan; and whether the act involves racial intolerance, prejudice or bias is not of concern under the Fourteenth Amendment, where the property is private. See Mr. Justice Douglas' concurring opinion in **Garner**, supra.

In conclusion, and for the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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CITY OF BIRMINGHAM,

Respondent.

**Certificate of Service.**

I, Earl McBee, one of the Attorneys for Respondent, City of Birmingham, and a member of the Bar of The Supreme Court of the United States, hereby certify that on the ..... day of March, 1962, I served a copy of Brief on behalf of respondent to Petition for Writ of Certiorari, in the above styled and numbered cause, on Jack Greenberg and on Constance Baker Motley, Attorneys for Petitioners, by depositing the same in a United States Post Office or mail box, with air mail postage prepaid, addressed to them at their post office address, namely, 10 Columbus Circle, New York 19, New York; and on the following respective Attorneys of Record for Petitioners whose addresses are known to Respondent by depositing the same in a United States Post Office or mail box, with first class postage prepaid, addressed to Arthur D. Shores, 1527 5th Avenue, North, Birmingham, Alabama; Orzell Billingsley, Jr., 1630 4th Avenue, North, Birmingham, Alabama; Peter A. Hall, Masonic Temple Building, Birmingham, Alabama; Oscar W. Adams, Jr., 1630 4th Avenue, North, Birmingham, Alabama; and J. Richmond Pearson, 415 North 16th Street, Birmingham, Alabama.

.....

Earl McBee,

Attorney for Respondent.

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IN THE

# Supreme Court of the United States

October Term, 1962

No. 67

F. L. SHUTTLESWORTH and CHARLES BILLUPS,

*Petitioners,*

—v.—

CITY OF BIRMINGHAM.

ON WRITS OF CERTIORARI TO THE COURT OF APPEALS OF ALABAMA

## BRIEF FOR PETITIONERS

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CITY OF BIRMINGHAM.

ON WRITS OF CERTIORARI TO THE COURT OF APPEALS OF ALABAMA

## BRIEF FOR PETITIONERS

### Opinions Below

The opinions of the Court of Appeals of Alabama are reported at 134 So. 2d 213 (Shuttlesworth, R. 43) and 134 So. 2d 215 (Billups, R. 67).

### Jurisdiction

The judgments of the Alabama Court of Appeals were entered on May 30, 1961 (Shuttlesworth, R. 44; Billups, R. 67).

Application for rehearing before the Court of Appeals of Alabama was denied on June 20, 1961 (Shuttlesworth, R. 45; Billups, R. 68). A petition to the Supreme Court of Alabama for Writ of Certiorari was denied on September 25, 1961, and application for rehearing was overruled on November 16, 1961 (Shuttlesworth, R. 46, 51; Billups,

R. 68). The jurisdiction of this Court is invoked pursuant to 28 United States Code, §1257 (3), petitioners having asserted below, and asserting here, the deprivation of his rights, privileges and immunities secured by the Constitution of the United States.

## Constitutional and Statutory Provisions Involved

This case involves the following constitutional provision:

Section 1 of the Fourteenth Amendment to the Constitution of the United States.

The case also involves the following provisions of the General Code of Birmingham of 1944:

"Section 824. It shall be unlawful for any person to incite, or aid or abet in, the violation of any law or ordinance of the city, or any provision of state law, the violation of which is a misdemeanor."

"Section 1436 (1944), *After Warning.* Any person who enters into the dwelling house, or goes or remains on the premises of another, after being warned not to do so, shall on conviction, be punished as provided in Section 4, provided, that this Section shall not apply to police officers in the discharge of official duties."

"Section 369 (1944), *Separation of races.* It shall be unlawful to conduct a restaurant or other place for the serving of food in the city, at which white and colored people are served in the same room, unless such white and colored persons are effectually separated by a solid partition extending from the floor upward to a distance of seven feet or higher, and unless a separate entrance from the street is provided for each compartment" (1930, Section 5288).

## Question Presented

Alabama has convicted petitioners of "incit[ing] or aid[ing] or abet[ting] another person to go or remain on the premises of another after being warned . . ." The record showed essentially that petitioner Shuttlesworth "asked for volunteers to participate in the sit-down demonstrations" and that petitioner Billups was present at this request. There was no evidence that either persuaded anyone to violate any law, or that anyone following petitioners' suggestions did violate any law, valid under the Fourteenth Amendment to the United States Constitution. A Birmingham ordinance requires racial segregation in restaurants.

In convicting and sentencing petitioners respectively to 180 and 30 days hard labor, plus fines, has Alabama denied liberty, including freedom of speech, secured by the due process clause of the Fourteenth Amendment?

## Statement of the Case

Petitioners, Rev. F. L. Shuttlesworth and Rev. Charles Billups, were convicted by the Recorder's Court of the City of Birmingham, Alabama and, upon a trial *de novo*, by an Alabama Circuit Court of a violation of Section 824, General City Code of Birmingham, 1944 (R. 8, 59).[1] The City's complaint alleged that petitioners, in violation of Section 824, "did incite or aid or abet" the violation of another City ordinance, Section 1436, which defines the crime of trespass after warning (R. 2, 53).[2] Petitioner Shuttles-

[1] See page 2, *supra*, for text of ordinance.

[2] See page 2, *supra*, for text of ordinance.

worth was fined $100 and sentenced to 180 days hard labor for the City while lesser penalties, $25 and 30 days, were imposed on Billups (R. 8, 59).

The convictions, appealed to the Alabama Court of Appeals, were affirmed, followed by unsuccessful attempts to secure review by the Supreme Court of Alabama (R. 43-45, 46-51, 66-68, 69).

The City undertook to sustain its burden of proof on the testimony of a single witness who did not personally witness any of the facts to which he testified but which the Circuit Court found sufficient for conviction. The witness, Charles L. Pierce, a Birmingham City detective, testified, over the repeated objections of petitioners' counsel, that he was present at petitioners' trial in Recorder's Court when two of the persons whom petitioners allegedly incited to violate a City ordinance, students James Gober and James Albert Davis, testified concerning the instant charge (R. 20-23).

The testimony Detective Pierce heard, and which forms the sole basis upon which the convictions were sustained, follows:

Gober testified that on March 30, 1960 he went to the home of Rev. Shuttlesworth where several others, including petitioners, were present and discussed sit-in demonstrations by Negro students (R. 27-28). Rev. Shuttlesworth participated in the discussion (R. 28). He then asked for "volunteers" for sit-in demonstrations (R. 29). Gober referred to a "list" but didn't know who had made it (R. 29-30). James Albert Davis testified that petitioner Billups came to Daniel Payne College, where Davis and Gober were students, and took Davis in his car to Shuttlesworth's house (R. 31). When Davis arrived, several persons were there, including Shuttlesworth, his wife, and a number of other

students from the College (R. 31). Rev. Shuttlesworth asked for "volunteers" and he (Davis) "volunteered" to go to Pizitz at 10:30 and take part in a sit-in demonstration (R. 31). Davis testified a list was made, but he, also, did not know who made the list (R. 31). Finally, Davis testified that Rev. Shuttlesworth "told him or made the announcement at that time that he would get them out of jail" (R. 31-32). To this testimony the detective added that he knew it was a fact that Gober and Davis did participate in a sit-in demonstration on March 31, 1960 (R. 33).

Upon the foregoing, petitioners were adjudged guilty of having incited or aided or abetted Gober, Davis, and other students to violate the trespass after warning ordinance (R. 40).

At every opportunity, petitioners urged the Fourteenth Amendment due process claim now before this Court. They first moved to strike the complaint (R. 3), then demurred (R. 4), moved to exclude the testimony (R. 6) and for new trial (R. 11). Again, in assignment of errors in the Court of Appeals (R. 41-42) and petition for certiorari in the Supreme Court of Alabama (R. 47-50) a violation of due process guaranteed by the Fourteenth Amendment to the Federal Constitution was urged.

Petitioners' due process claim is that: 1) Section 824, General Code of Birmingham, as applied to them, deprives them of freedom of assembly and speech; 2) there is no evidence at all that petitioners incited, aided or abetted any violation of law or that a violation of law in fact occurred; and 3) Section 824 as applied is so vague as to constitute a denial of due process of law in violation of the Fourteenth Amendment.

The only court which rendered an opinion was the Alabama Court of Appeals (R. 43-44, 67). It limited review to

considering the sufficiency of the evidence to support a conviction for violation of Section 824. In Rev. Shuttlesworth's case that court found it sufficient that " . . . 'Shuttlesworth asked for volunteers, and that there were some volunteers to take part in sit-down demonstrations' and that Shuttlesworth promised to get them (the students) out of jail" (R. 44). The court then held that, "A sit-down demonstration being a form of trespass after warning, denotes a violation of both state law and especially of Section 1436 of the City Code" (R. 44). Having found that the evidence was sufficient to sustain the conviction on the ground of incitement, the court then ruled that no Fourteenth Amendment free speech rights were involved. It held that petitioners "counseled the college students not merely to ask service in a restaurant, but urged, convinced and arranged for them to remain on the premises presumably for an indefinite period of time" (R. 44). The court found the situation here analogous to illegal sit-down strikes in the automobile industry (R. 44).

Rev. Billups' conviction was upheld on the authority of the Shuttlesworth case, except for the following addition: On March 30, 1960 Rev. Billups went to Daniel Payne College in a car where he picked up one of the students, Davis, and drove him to the home of Rev. Shuttlesworth where several people had gathered and where Rev. Billups also was present (R. 67).

# ARGUMENT

## I.

## Fourteenth Amendment Due Process Imperatives Require Reversal of These Convictions.

### A. There Is No Evidence in This Record on Which These Convictions May Be Affirmed.

The Alabama courts have held the facts set forth above sufficient to convict petitioners of inciting a violation of an ordinance which provides that, "Any person who . . . goes or remains on the premises of another, after being warned not to do so, shall on conviction, be punished. . . . "

Petitioner Shuttlesworth asked for "volunteers" to participate in a sit-in demonstration.[3] But there is no evidence that he incited these volunteers to "remain on the premises of another, after being warned not to do so." Moreover, there is no evidence in this record to sustain a finding that these volunteers did in fact remain on the premises of another after being duly warned not to do so.

Even the Alabama Court of Appeals recognized that there was no evidence to support the charge and so it surmised that petitioners "counseled the college students not merely to ask service in a restaurant, but urged, con-

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[3] See, Pollitt, Duke L. J., *Dime Store Demonstrations: Events and Legal Problems of First Sixty Days*, 315 (1960).

Prior to February 1960, lunch counters throughout the South denied normal service to Negroes. Six months later, lunch counters in 69 cities had ended their discriminatory practices (N. Y. Times, Aug. 11, 1960, p. 14, col. 5). By September 1961, desegregation had occurred in business establishments located in more than 100 cities in fourteen states (The Student Protest Movement: A Recapitulation, Southern Regional Council, Sept. 1961); and since then the number has continued to increase without apparent incident.

vinced and arranged for them to remain on the premises *presumably* for an indefinite period of time" (R. 44). (Emphasis added.)

The Alabama Court then rationalized that, "There is a great deal of analogy to the sit-down strikes in the automobile industry referred to in *National Labor Relations Board* v. *Fansteel Metallurgical Corp.*, 306 U. S. 240" (R. 44). This may very well be true, but this record is devoid of any proof of the analogy. There is not a scintilla of evidence in this record that petitioners urged, suggested, or intended the sit-in demonstrators engage in any unlawful conduct. What petitioners in fact urged is simply and plainly not shown by this record. All the record shows as to petitioner Billups is that he drove one of the students to Rev. Shuttlesworth's home and was present during the discussion. For all that the record shows, this petitioner remained silent.

Sit-down demonstrations have taken many forms.[4] And many of these convictions have been reversed as not having been evidence of a crime. See *Garner* v. *Louisiana*, 368 U. S. 157; see *Pollitt, op. cit. supra*, at p. 350 (trespass convictions of students convicted in Raleigh, N. C. dismissed); *King* v. *City of Montgomery*, —— Ala. ——, 128 So. 2d 341 (trespass convictions for sit-in in private hotel reversed); *Briscoe* v. *State of Texas*, 341 S. W. 2d 432; *Rucker* v. *State of Texas*, 341 So. 2d 434; *Tucker* v. *State of Texas*, 341 So. 2d 433; *Johnson* v. *State of Texas*, 341 So. 2d 434 (convictions of sit-ins for unlawful assembly reversed). Moreover, the students who sought service at the lunch counters in the Birmingham cases before this Court for review did not violate any valid ordinance by peacefully seeking such food service since the Birmingham

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[4] *Ibid.*

ordinance requiring racial segregation in restaurants or other places serving food is unconstitutional on its face.[5] *Turner* v. *City of Memphis*, 369 U. S. 350.

The due process criterion applied by this Court in *Garner*, *supra*, and *Thompson* v. *City of Louisville*, 362 U. S. 199, must be invoked here to void these convictions on records barren of evidence.

**B. This Record Discloses Only an Exercise of Constitutionally Protected Freedom of Assembly and Speech.**

Protest demonstrations against racial discrimination in places of public accommodation in the United States antedate by almost a century the current wave of Negro student "sit-in" or "sit-down" demonstrations which commenced in Greensboro, North Carolina on February 1, 1960.[6]

The more recent Negro student sit-in demonstrations have been viewed from their inception as the exercise of

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[5] " 'Sec. 369. Separation of Races.

It shall be unlawful to conduct a restaurant or other place for serving of food in the city, at which white and colored people are served in the same room, unless such white and colored persons are effectually separated by a solid partition extending from the floor upward to a distance of seven feet or higher, and unless a separate entrance from the street is provided for each compartment' " (1930, §5288).

This ordinance is judicially noticeable by the Alabama courts, Ala. Code Ann. Tit. 7. §429 (1) (1940). See *Shell Oil* v. *Edwards*, 263 Ala. 4, 9, 81 So. 2d 535, 539 (1955); *Smiley* v. *City of Birmingham*, 255 Ala. 604, 605, 52 So. 2d 710, 711 (1951). " 'The act approved June 18, 1943, requires that all courts of the State take judicial knowledge of the ordinances of the City of Birmingham.' " *Monk* v. *Birmingham*, 87 F. Supp. 538 (N. D. Ala. 1949), aff'd 185 F. 2d 859, cert. denied 341 U. S. 940. And this Court takes judicial notice of laws which the highest court of a state may notice. *Junction R.R. Co.* v. *Ashland Bank*, 12 Wall. (U. S.) 226, 230; *Abie State Bank* v. *Bryan*, 282 U. S. 765, 777, 778; *Adams* v. *Saenger*, 303 U. S. 59; *Owings* v. *Hull*, 9 Peters (U. S.) 607, 625.

[6] Westin, *"Ride-In,"* American Heritage, Vol. XIII, No. 5, p. 57 (1962).

constitutionally guaranteed free speech under at least some circumstances. *Garner v. Louisiana*, 368 U. S. 157. (Concurring Opinion of Mr. Justice Harlan.) They are, by their inherent and manifest nature, a protest against racial discrimination.[7]

The record here discloses only that these petitioners met with Negro students shortly after these protests began on February 1, 1960 and discussed these demonstrations. The sole witness in this case testified that he heard one of the students testify that " . . . the meeting was in the living room of Reverend Shuttlesworth's house and that Reverend Shuttlesworth participated in the discussion about the sit-down demonstrations" (R. 28). Petitioner Shuttlesworth asked for "volunteers" to participate in a "sit-in" or "sit-down" demonstration. At one point, petitioner Shuttlesworth told one of the students that he would get him out of jail. Beyond this, there is no evidence in this record concerning precisely the activities petitioners are supposed to have counseled and no evidence concerning the "sit-in" or "sit-down" demonstrations themselves which followed this counsel.

The Birmingham city ordinance requiring racial segregation in public restaurants makes clear that the City's policy was one of racial segregation in this area and that the sit-in demonstrations here as in other communities across the South were designed as a protest against this state policy.

The due process clause of the Fourteenth Amendment guarantees the right to make a peaceful protest against state enforced racial segregation. *NAACP* v. *Alabama*, 357 U. S. 449. The evidence in the students' cases before this Court is uncontradicted that the students were at all times

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[7] Note, *Lunch Counter Demonstrations; State Action and the Fourteenth Amendment*, 47 Virginia Law Review 105.

peaceful. At the very least, the constitutional protection extends to a discussion in a private home of sit-ins, especially where it is not demonstrated that any unlawful action was discussed or, in fact, taken.

To sustain these convictions would license Alabama to invade the privacy and freedom of every home where anti-discrimination discussions take place. Mr. Justice Brandeis' admonition in his dissenting opinion in *Gilbert* v. *Minnesota*, 254 U. S. 325, where this Court had upheld, against a similar free speech consideration, a statute proscribing the teaching of pacifism is particularly applicable here. Justice Brandeis warned that the statute there made it a crime "to teach in any place a single person that a citizen should not aid in carrying on a war, no matter what the relation of the parties may be. Thus the statute invades the privacy and freedom of the home. Father and mother may not follow the promptings of religious belief, of conscience or of conviction, and teach son or daughter the doctrine of pacifism. If they do any police officer may summarily arrest them" (at pp. 335-336).

Petitioners here need not claim an absolute immunity from state regulation of their free speech activities, but they claim that their discussions on the night of March 30, 1960, are protected against the punishment which the state here seeks to impose, since there has been no showing that their discussion was " . . . likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest." *Terminiello* v. *Chicago*, 337 U. S. 1, 4. Petitioners are not charged with having conducted a meeting in an unlawful manner, e.g., by sound truck, *Kovacs* v. *Cooper*, 336 U. S. 77 or without a permit where one was required, *Cox* v. *New Hampshire*, 312 U. S. 569, or under circumstances dangerous to public safety, e.g., *Feiner* v. *New York*, 340 U. S. 315,

but cf. *Terminiello* v. *City of Chicago*, 337 U. S. 1, or to have spoken or met in a manner otherwise illegal. Neither have they been punished for crime for having created a clear and present danger of a substantive evil which the state has the power to prevent. Cf. *Schenck* v. *United States*, 249 U. S. 47.

The Court of Appeals of Alabama rested its free speech restriction in this case upon the fact that petitioner Shuttlesworth had promised to get the students out of jail; but, as pointed out above, there is no evidence in this record at all that Shuttlesworth requested any one to perform an unlawful act. Many of the sit-in demonstrators have been arrested and their convictions have been reversed. And, as this Court ruled in the *Garner* case *supra*, such demonstrations are not necessarily a crime.

The convictions of these petitioners under the facts of this case are so clearly repugnant to our common notions of rights protected by the constitutional guarantees of freedom of assembly and speech as to require reversal by this Court.

**C. The Ordinance for Violation of Which Petitioners Were Convicted Is Constitutionally Vulnerable on the Grounds of Vagueness.**

Petitioners were convicted of inciting students to violate the trespass after warning ordinance of the City of Birmingham. This ordinance, which provides that, "It shall be unlawful for any person to incite, or aid or abet in, the violation of any law or ordinance of the City, or any provision of state law the violation of which is a misdemeanor", is constitutionally vague.

The record here shows that these petitioners did no more than discuss sit-in demonstrations and offer to assist those who volunteered for such demonstrations if they should

become embroiled with the law. The ordinance which convicts them clearly did not give fair warning that to discuss such a sit-in protest is a crime. Indeed, as observed, *supra*, often the demonstrations have resulted in desegregation; when criminal prosecution has ensued, frequently it has failed.

This Court has repeatedly held that a criminal statute or ordinance of this kind must give fair warning to a defendant of what acts are prohibited, *Connally* v. *General Construction Co.*, 269 U. S. 385; and where, as in this case, free speech encroachments are involved, the statute must be even more specific. *Winters* v. *New York*, 333 U. S. 507; *Burstyn* v. *Wilson*, 343 U. S. 495; *Saia* v. *New York*, 334 U. S. 558; *Chaplinsky* v. *New Hampshire*, 315 U. S. 568. Consequently, where the law has given no notice that lawful free speech may be criminal, these convictions cannot be sustained.

## CONCLUSION

**For all the foregoing reasons, the petitioners' convictions by the Alabama courts must be reversed.**

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# In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 11

JOHN THOMAS AVENT, ET AL., PETITIONERS

*v.*

STATE OF NORTH CAROLINA

No. 58

RUDOLPH LOMBARD, ET AL., PETITIONERS

*v.*

STATE OF LOUISIANA

No. 66

JAMES GOBER, ET AL., PETITIONERS

*v.*

CITY OF BIRMINGHAM

No. 67

F. L. SHUTTLESWORTH, ET AL., PETITIONERS

*v.*

CITY OF BIRMINGHAM

No. 71

JAMES RICHARD PETERSON, ET AL., PETITIONERS

*v.*

CITY OF GREENVILLE

*ON WRITS OF CERTIORARI TO THE SUPREME COURTS OF NORTH CAROLINA, LOUISIANA, AND SOUTH CAROLINA, AND TO THE COURT OF APPEALS OF ALABAMA*

**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE**[1]

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**OPINIONS BELOW**

The opinion of the Supreme Court of North Carolina in *Avent* (A. 72–90) [2] is reported at 253 N.C. 580, 118 S.E. 2d 47.

The opinion of the Supreme Court of Louisiana in *Lombard* (L. 141–151) is reported at 241 La. 958, 132 So. 2d 860. The opinion of the Criminal District Court of Orleans Parish overruling petitioners' motion to quash (L. 28–86) is not reported.

The opinion and orders of the Alabama Court of Appeals (G. 57–64, 88, 124, 144, 178, 194, 220, 236, 262, 278) and the orders of the Supreme Court of Alabama (G. 69, 92, 128, 144, 182, 194, 224, 236, 266, 278) in *Gober* are reported, *inter alia*, at 133 So. 2d 697–708.

The opinions of the Alabama Court of Appeals (S. 42–44, 67) and the orders of the Supreme Court of Alabama (S. 46, 69) in *Shuttlesworth* are reported at 134 So. 2d 213.

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[1] This brief will not consider *Wright* v. *Georgia*, No. 68. Since that case involves arrests for unlawfully assembling on *municipal* property, it does not present the paramount issue considered in the cases discussed in this brief as to the rights of private businesses to exclude Negroes from all or a portion of their premises. We believe, however, that the convictions in *Wright* should be reversed for reasons advanced by the petitioners in that case. The United States, as *amicus curiae*, is filing a separate brief in *Griffin* v. *Maryland*, No. 26, this Term.

[2] The records in *Avent* v. *North Carolina*, No. 11, *Lombard* v. *Louisiana*, No. 58, *Gober* v. *Birmingham*, No. 66, *Shuttlesworth* v. *Birmingham*, No. 67, and *Peterson* v. *Greenville*, No. 71, are referred to as "A.," "L.," "G.," "S.," and "P.," respectively.

The opinion of the Supreme Court of South Carolina in *Peterson* (P. 55–59) is reported at 122 S.E. 2d 826. The opinion of the Greenville County Court (P. 50–52) is not reported.

**JURISDICTION**

The judgment of the Supreme Court of North Carolina in *Avent* was entered on January 20, 1961 (A. 90).

The judgment of the Supreme Court of Louisiana in *Lombard* was entered on June 29, 1961 (L. 149).

The judgments of the Alabama Court of Appeals in *Gober* were entered on May 30, 1961 (G. 57, 88, 124, 144, 178, 194, 220, 236, 262, 278). Petitions to the Supreme Court of Alabama for writs of certiorari were denied on September 14, 1961 (G. 69, 92, 128, 144, 182, 194, 224, 236, 266, 278); and applications for rehearing were overruled on November 2, 1961 (G. 71, 92, 128, 144, 182, 194, 224, 236, 266, 278.)

The judgments of the Alabama Courts of Appeals in *Shuttlesworth* were entered on May 30, 1961 (S. 43, 66). Application for rehearing before the Court of Appeals of Alabama was denied on June 20, 1961 (S. 45, 68). A petition to the Supreme Court of Alabama for a writ of certiorari was denied on September 25, 1961 (S. 46, 69), and application for rehearing was overruled on November 16, 1961 (S. 51, 74).

The judgment of the Supreme Court of South Carolina in *Peterson* was entered on November 10, 1961 (P. 55), and a petition for rehearing was denied on November 30, 1961 (P. 62).

The petitions for writs of certiorari were granted by this Court on June 25, 1962 (370 U.S. 934–935; A. 92, L. 152, G. 279, S. 75, P. 65). The jurisdiction of this Court rests upon 28 U.S.C. 1257(3).

## QUESTIONS PRESENTED

Petitioners are Negroes who were invited into department and variety stores as customers. They were refused service at lunch counters or in lunch rooms under the proprietor's practice of enforcing racial segregation in the store's dining facilities. In Nos. 11, 66, 67 and 71, there was little evidence as to motive, but the proprietor's practice of racial discrimination in fact conformed to current municipal ordinances requiring racial segregation in public eating places. In No. 58, although there was no ordinance specifically requiring segregation in public eating places, the proprietor's practice of racial discrimination knowingly conformed to a current and pervasive State policy of maintaining racial segregation expressed in numerous legislative enactments and official declarations. Petitioners in each case refused to leave the lunch counters or lunch rooms upon being denied service. They were arrested and convicted of criminal trespass or a similar offense.

The questions presented are:

1. Whether, upon the records in Nos. 11, 66, 67 and 71, the convictions are sufficiently related to the ordinances requiring racial segregation that they should be set aside on the ground that they result from a denial of equal protection of the laws in violation of the Fourteenth Amendment.

2. Whether, upon the record in No. 58, the convictions are sufficiently related to the State laws and policies maintaining racial segregation that they should be set aside on the ground that they result from a denial of equal protection of the laws in violation of the Fourteenth Amendment.

## INTEREST OF THE UNITED STATES

The fundamental constitutional issue in these cases is to what extent the Fourteenth Amendment condemns, as a denial of equal protection of the laws, enforcement by the States of racial segregation in private businesses open to the general public. This problem involves not only the power of the States but also the constitutional rights of millions of American citizens. On the one hand, millions of Negroes (as well as some other groups) are subjected to racial discrimination in private businesses open to the public. The "sit-in" activities resulting in petitioners' convictions were part of a widespread peaceful protest against this practice. Petitioners claim that the involvement of the States in their convictions violates the equal protection clause of the Fourteenth Amendment. On the other hand, the respondents invoke both the power of the States to preserve order and also the freedom and responsibility of individuals to make their own decisions concerning the use of private property and choice of associates. Thus, the basic issue in these cases involves the competing claims of large numbers of citizens, and of the States, and is of grave importance to the country as a whole.

The petitions for certiorari in each of these cases urge various grounds for reversal. Since the primary interest of the United States is in the fundamental question which is described above, we will confine this brief on behalf of the United States to a discussion of that question.

## STATEMENT[3]

### 1. AVENT V. STATE OF NORTH CAROLINA, NO. 11

*a. Statutes Involved.*—Chapter 13, Section 42, of the Code of Durham, North Carolina (1947), provides:

> In all licensed restaurants, public eating places and 'weenie shops' where persons of the white and colored races are permitted to be served with, and eat food, and are allowed to congregate, there shall be provided separate rooms for the separate accommodation of each race. The partition between such rooms shall be constructed of wood, plaster or brick or like material, and shall reach from floor to the ceiling. Any person violating this section shall, upon conviction, pay a fine of ten dollars and each day's violation thereof shall constitute a separate and distinct offense.

Petitioners were convicted of violating Section 14–134 of the North Carolina General Statutes, which provides:

> *Trespass on land after being forbidden.* * * * If any person after being forbidden to do so, shall go or enter upon the lands of another, without a license therefor, he shall be guilty of a misdemeanor and on conviction, shall be fined not

[3] We have set forth fully only the facts of each of the cases that may be relevant to the legal issues that we consider in this brief.

exceeding fifty dollars or imprisoned not more than thirty days * * *.

*b. The Facts.*—On May 6, 1960, petitioners, five Negro students from North Carolina College and two white students from Duke University, both of which are in Durham, North Carolina, entered Kress' Department Store in Durham (A. 1, 2, 4, 5, 6, 8, 9, 35). On the two selling floors of the store, there are approximately fifty counters (including a "standup" lunch counter) which serve Negroes and whites without racial distinction (A. 21, 22). No sign at the store's entrance barred or conditioned Negro patronage (A. 22). Petitioners made various purchases, as some of them had in the past, and eventually went to the basement lunch counter (A. 21, 35, 39, 41, 43, 46, 47, 48).[4] There a sign stated "Invited Guests and Employees Only" (A. 23). The manager testified that, although no invitations as such were sent out, white persons automatically were considered guests; Negroes, and whites accompanied by Negroes, were not

[4] Petitioners were participants in an informal student organization which opposed racial segregation. They believed that they had a right to service at Kress' basement lunch counter after having been customers in other departments (A. 36, 40, 44–45). Some had previously picketed the store to protest its policy of welcoming Negroes' business while refusing them lunch counter service (A. 41, 43, 46, 48, 49). Some of the petitioners had requested and had been denied service on previous occasions at Kress' lunch counter (A. 37). Some of the petitioners testified that they expected to be served at the basement lunch counter because they had been served upstairs (A. 39, 48, 49). Various petitioners testified that they did not expect to be arrested for trespassing on this occasion (A. 37, 38, 41, 43, 48, 49).

(A. 21–23).[5] The counter was separated from other departments by an iron railing (A. 21). The store manager testified that the entrances to the counter were chained, but petitioner Streeter denied this (A. 21, 37).

The manager declined to serve the students and asked them to leave (A. 21). He stated that if Negroes wanted service they might obtain it at a stand-up counter upstairs (A. 22). The manager then called the police (A. 21). After being asked by the police officers to leave, petitioners persisted in their refusal and were arrested for trespass (A. 21, 24–25).[6]

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[5] The manager testified that "the luncheonette was open for the purpose of serving customers food. Customers on that date were invited guests and employees" (A. 21). He testified further that "We had signs all over the luncheonette to the effect that it was open for employees and invited guests. Mr. Pearson [petitioners' Negro attorney], I do not consider you an invited guest, under the circumstances right now. I do consider Mr. Murdock [the State Solicitor] an invited guest under the circumstances" (A. 22). He also testified: "I would serve this young lady (indicating the white female defendant), but I asked her to leave when she gave her food to a Negro. She was my invited guest at that time, up until the time that I asked her to leave" (A. 23).

Portions of the record suggest that the police were already present at the time the manager first asked the students to leave (A. 35, 40, 42, 44, 47, 48). For example, petitioner Phillips testified that "When I took a seat at the lunch counter, I was approached by Mr. W. K. Boger, who said, 'You are not an invited guest, and you are not an employee; so I am asking you to leave.' Before I could ask him who he was, the police officer directed me to the back of the store" (A. 40).

[6] It is not clear whether, after the arrival of the police officer, the manager again asked petitioners to leave (compare A. 21 with A. 24-25).

Petitioner Nelson, one of the white students, was asked to leave after she offered food to Negroes. The manager told her

The Kress manager explained his refusal to serve the students at the trial (A. 22–23):

> * * * It is the policy of our store to wait on customers dependent upon the customs of the community. * * * It is the policy of our store to operate all counters in the interest of the customs of the community. * * * In the interest of public safety it is our policy to refuse to serve Negroes at the luncheonette downstairs in our seating arrangements. It is also the policy of Kress to refuse the patronage of white people in the company of Negroes at that counter. Even if Negroes accompanied by white people were orderly at our luncheonette because of the policy of the community we would not serve them, and that was our policy prior to May 6, 1960. * * * It is not the custom of the community to serve Negroes in the basement luncheonette, and that is why we put up the signs, "Invited Guests and Employees Only."

Petitioners were indicted in the Superior Court of Durham County, the indictments stating that each petitioner (A. 1–10):

> with force and arms, * * * did unlawfully, willfully, and intentionally after being forbidden to do so, enter upon the land and tenement of S. H. Kress and Co. store * * * said S. H. Kress and Co., owner, being then and there in actual and peaceable possession of said premises, under the control of its manager and

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that she was "antagonizing the customers" (A. 42). Petitioner Brown was told by the manager that "[t]he custom has not been changed, and you will have to leave" (A. 44).

> agent, W. K. Boger, who had, as agent and manager, the authority to exercise his control over said premises, and said [petitioner] after being ordered by said W. K. Boger, agent and manager of said owner, S. H. Kress and Co., to leave that part of the said store reserved for employees and invited guests, willfully and unlawfully refused to do so knowing or having reason to know that * * * [petitioner] had no license therefor, against the form of the statute in such case made and provided and against the peace and dignity of the state.[7]

Petitioners pleaded not guilty and were tried by a jury on June 30 and July 1, 1960 (A. 15–16). The jury returned a verdict of guilty (A. 16). Three of the petitioners received thirty-day sentences, one received a twenty-day sentence, one received a fifteen-day sentence, and, in two cases, sentence was continued for two years (A. 16–20).

On January 20, 1961, the Supreme Court of North Carolina affirmed the convictions (A. 73). In a lengthy opinion, the court emphasized that (A. 78):

> No statute of North Carolina requires the exclusion of Negroes and of White people in company with Negroes from restaurants,[8] and no statute in this State forbids discrimination by the owner of a restaurant of people on account of race or color, or of White people in company with Negroes. In the absence of a statute for-

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[7] The indictments of all the petitioners carried a racial designation, *viz.*, "CM," "WM," "CF," and "WF" (A. 2, 3, 5, 6, 7, 9, 10).

[8] A municipal ordinance in Durham, however, does require segregation in restaurants. See *supra*, p. 6.

bidding discrimination based on race or color in restaurants, the rule is well established that an operator of a privately owned restaurant privately operated in a privately owned building has the right to select the clientele he will serve, and to make such selection based on color, race, or White people in company with Negroes or vice versa, if he so desires. He is not an innkeeper. This is the common law. * * *

2. LOMBARD V. STATE OF LOUISIANA, NO. 58

*a. Statute Involved.*—The Louisiana statute under which petitioners were convicted is La. R.S. 14:59(6), as amended 1960, which provides:

> Criminal mischief is the intentional performance of any of the following acts:
>
> * * * * * *
>
> (6) Taking temporary possession of any part or parts of a place of business, or remaining in a place of business after the person in charge of such business or portion of such business has ordered such person to leave the premises and to desist from the temporary possession of any part or parts of such business.

The statute states that "[w]hoever commits the crime of criminal mischief shall be fined not more than $500.00, or imprisoned for not more than one year, or both."

*b. The Facts.*—On September 10, 1960, one week prior to the "sit-in" demonstration out of which this case arose, a group of Negroes conducted at Woolworth's Department Store in New Orleans, Louisiana, the first "sit-in" demonstration to occur in that city. On the same day, the New Orleans Superintendent of

Police issued the following statement, which was published in the New Orleans *Times-Picayune* (L. 17, 139–140):

> The regrettable sit-in activity today at the lunch counter of a Canal St. chain store by several young white and Negro persons causes me to issue this statement to the citizens of New Orleans.
>
> We urge every adult and juvenile to read this statement carefully, completely and calmly.
>
> First, it is important that all citizens of our community understand that this sit-in demonstration was initiated by a very small group.
>
> We firmly believe that they do not reflect the sentiments of the great majority of responsible citizens, both white and Negro, who make up our population.
>
> We believe it is most important that the mature responsible citizens of both races in this city understand that and that they continue the exercise of sound, individual judgment, goodwill and a sense of personal and community responsibility.
>
> Members of both the white and Negro groups in New Orleans for the most part are aware of the individual's obligation for good conduct—an obligation both to himself and to his community. With the exercise of continued, responsible law-abiding conduct by all persons, we see no reason for any change whatever in the normal, good race-relations that have traditionally existed in New Orleans.
>
> At the same time we wish to say to every adult and juvenile in this city that the police department intends to maintain peace and order.

> No one should have any concern or question over either the intent or the ability of this department to keep and preserve peace and order.
>
> As part of its regular operating program, the New Orleans police department is prepared to take prompt and effective action against any person or group who disturbs the peace or creates disorder on public or private property.
>
> We wish to urge the parents of both white and Negro students who participated in today's sit-in demonstration to urge upon these young people that such actions are not in the community interest.
>
> Finally, we want everyone to fully understand that the police department and its personnel is ready and able to enforce the laws of the city of New Orleans and the state of Louisiana.[9]

On September 13, 1960, four days prior to the "sit-in" demonstration out of which this case arose, Mayor DeLesseps Morrison also issued a statement which was printed in the *Times-Picayune*. The Mayor said (L. 14, 15, 138–139):

> I have today directed the superintendent of police that no additional sit-in demonstrations or so-called peaceful picketing outside retail stores by sit-in demonstrators or their sympathizers will be permitted.
>
> The police department, in my judgment, has handled the initial sit-in demonstration Friday

[9] At the trial of the petitioners in *Lombard*, the Superintendent of Police testified that the reason for his statement was that he "was hoping that situations of this kind would not come up in the future to provoke any disorder of any kind in the community" (L. 17).

and the follow-up picketing activity Saturday in an efficient and creditable manner. This is in keeping with the oft-announced policy of the New Orleans city government that peace and order in our city will be preserved.

I have carefully reviewed the reports of these two initial demonstrations by a small group of misguided white and Negro students, or former students. It is my considered opinion that regardless of the avowed purpose or intent of the participants, the effect of such demonstrations is not in the public interest of this community.

Act 70 of the 1960 Legislative session redefines disturbing the peace to include "the commission of any act as would foreseeably disturb or alarm the public."

Act 70 also provides that persons who seek to prevent prospective customers from entering private premises to transact business shall be guilty of disorderly conduct and disturbing the peace.

Act 80—obstructing public passages—provides that "no person shall wilfully obstruct the free, convenient, and normal use of any public sidewalk, street, highway, road, bridge, alley or other passage way or the entrance, corridor or passage of any public building, structure, water craft or ferry by impeding, hindering, stifling, retarding or restraining traffic or passage thereon or therein."

It is my determination that the community interest, the public safety, and the economic welfare of this city require that such demon-

strations cease and that henceforth they be prohibited by the police department.[10]

On September 17, 1960 (one week after the Superintendent's statement and four days after the Mayor's statement), the petitioners here, three Negroes and one white person, sat down at counter seats at the white refreshment counter at McCrory's Five and Ten Cents Store in New Orleans. McCrory's, which "caters to the general public," is a branch of a national chain doing business in thirty-four states (L. 19).

Although no sign indicated any racial restriction as to service, the counter where petitioners sat had been restricted to white patronage since 1938 (L. 105, 110). The counter manager (Mr. Graves) advised petitioners that he could not serve them there and that

[10] The Mayor testified at petitioners' trial that the superintendent of police "serves under [the Mayor's] direction," and that "[i]t is the policy of my office and that of the City Government to set the line or direction of policy to the police department" (L. 13). The Mayor further testified that his statement was issued "following the initial sit-in and follow-up demonstration the next day, I believe by picketing in the same area, and I outlined to the police department and the community the two acts of the Legislature 70 and 80 which dealt with this matter and gave the reasons in the public interest that we should carry out the intent and purpose of the law" (L. 14). He testified that his statement "encompasse[d] any laws covering questions of disturbing the peace, of public acts which would create a disturbance or confusion, disturbances of the peace, and specifically quoted these two acts because they are of recent nature and somewhat specific in regard to the question, but I have a feeling that matters of this kind, when persons engage in this type of demonstration as a natural consequence will create disturbances of the peace and in many cases set off chain reactions that can be much more serious" (L. 16).

they could be served at a colored counter in the rear of the store (L. 105, 110). The petitioners made no reply (L. 105). Although petitioners were not creating a disturbance or doing anything except sitting at the counter (L. 108), Mr. Graves closed the counter because Negroes were present (L. 105, 108). Petitioners nonetheless remained seated. The police were called by store personnel (L. 107), and the store manager, Mr. Barrett, arrived (L. 112). Shortly thereafter several police officers arrived (L. 112). Mr. Barrett informed the police that he wanted the Negroes to leave, but an officer informed him that he must request them to leave in the presence of the police (L. 126). The police then witnessed Mr. Barrett's request to the petitioners that they leave the counter area (L. 113). When petitioners did not leave, a police officer, Major Reuther, informed them that they were violating the law "and if the manager insisted that they move we would have to put them under arrest" (L. 129). After a short period, the police arrested petitioners (L. 129), who were charged with criminal mischief under La. R.S. 14:59(6), *supra*, p. 10.

Testimony was adduced at a hearing on petitioners' motion to quash the information and at the trial on the merits concerning the reasons that petitioners were not served at the counter. The store manager testified that he exercises discretion as to whether Negroes should be served [11] (L. 21), and that "[t]he policy

[11] Mr. Barrett testified that he was authorized by the "national office" of McCrory's chain to determine the segregation policies of the New Orleans store (L. 21). The trial court

[as to serving Negroes] is determined by local tradition, law and custom, as interpreted by me" (L. 21). The manager testified further that when, as occasionally happened, Negroes sought service at a white lunch counter he "would tell them we had a colored counter in the back, because they might be passing through from the North and not understand Southern customs" (L. 117–118).[12]

When asked whether "in the last 30 to 60 days [he had] entered into any conference with other department store managers here in New Orleans relative to sit-in problems" (L. 22) the manager replied that "[w]e have spoken of it" (L. 23).

Mayor Morrison and the Superintendent of Police testified concerning the custom in New Orleans with respect to segregated eating facilities. The Mayor stated that to his personal knowledge no lunch counter in the city served both Negroes and whites together (L. 15). The Superintendent of Police testified that, in his experience as a member of the police force for fifteen years, and as a resident of New Orleans, he had not known of "any public establishments that cater to both Negroes and whites at the same lunch counter in the city of New Orleans" (L. 18).

The trial court refused to allow a series of questions designed to ascertain whether the manager's decision

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sustained objections to questions designed to reveal the practice of McCrory's stores in other states (L. 19–20, 22) and the power of the national office to overrule a manager's decision (L. 22).

[12] Mr. Barrett also replied "[y]es, sir" to counsel's question whether his decision was based on "state policy and practice and custom in this area" (L. 25).

was dictated or influenced by "state policy." Thus, Mr. Barrett was not permitted to say whether he "discussed methods and means to handle these situations if they arise in any particular department store" (L. 23), although counsel observed that the "purpose of this Your Honor is a question of conformity with state policy" (L. 23). Again, the manager was not allowed to reply to questions as to whether "if the state policy or practice would be different you would exercise your discretion in a different manner" and whether "if there was no custom of segregated lunch counters or no state policy, the general atmosphere would be different, would you allow Negroes to eat at white lunch counters" (L. 25, 26). Similarly, the trial court ruled out a question to Mr. Graves, the counter manager, as to "why [he was] not allowed to serve them," despite counsel's contention that the question was "material, because if Mr. Graves felt there was some state policy that prevented him from serving these defendants this is a clear state action" (L. 109–110).[13]

The trial court also excluded a series of questions designed to ascertain whether the police had been actively involved in the manager's decision to refuse service to petitioners. Captain Cutrera, one of the arresting officers, was not permitted to say whether

[13] Petitioners introduced into evidence a series of bills, some of which were ultimately enacted into law, of the 1960 session of the Louisiana state legislature. Petitioners contended that these bills and statutes (including the criminal mischief statute under which petitioners were convicted) demonstrated a state policy of racial discrimination (see L. 26–27 and the opinion of the Louisiana Supreme Court, quoted *infra*, p. 19).

"there was any plan approved by the police as to what [the store personnel] should do in the event of a sit-in" (L. 127–128). And Mr. Barrett was not allowed to reply to the question whether he had "ever met with members of the New Orleans Police Department and discussed problems of sit-in demonstrations and how you or how they should be handled if they arise in your store?" (L. 23). Similarly, counsel was not allowed to determine whether Mr. Graves had called the police "on his own initiative;" the question was asked in order to learn whether he had "any plan * * * with the police" (L. 107).[14]

Petitioners were convicted of violating the "criminal mischief" law, sentenced to sixty days in jail, and fined $350 each (L. 8). The convictions were affirmed by the Supreme Court of Louisiana. *State* v. *Goldfinch*, 132 So. 2d 860, 241 La. 958 (1961) (L. 141–149). The State Supreme Court rejected the contention that "by content, reference and position of context [the statute] is designed to apply to, and be enforced in an arbitrary manner against, members of the Negro race and those acting in concert with them" (L. 145), stating (L. 145–146):

> * * * In aid of this assertion certain House bills of the Louisiana legislature for 1960, introduced in the same session with the contested statute, were offered in evidence. All of these bills did not become law, but some did. It is declared that this law and the others enacted

[14] Mr. Graves did testify at another point that he had called the police "as a matter of routine procedure," and that he had "no particular plan" for the handling of sit-ins; they were to be handled like any other emergency situation (L. 106).

> during the same session were designed to apply to and be enforced against, in an arbitrary manner, members of the Negro race. We have carefully reviewed the provisions of these bills referred to which were enacted into law and nowhere in their content or context do we find that any of them seek to discriminate against any class, group, or race of persons. We therefore find no merit in this contention and, accordingly, dismiss it as being unsupported.

The court also considered the contention that "the action of the manager of McCrory's was provoked or encouraged by the state, its policy, or officers, and * * * that this action of McCrory's was not its own voluntary action, but was influenced by the officers of the state" (L. 146). It held (L. 146–147):

> The conclusion contended for is incompatible with the facts. Rather, the testimony supports a finding that the manager of McCrory's had for the past several years refused service to Negroes, that the policy of the store was established by him, that he had set out the policy and followed it consistently; that Negroes had habitually been granted access to only one counter within the store and a deliberately provoked mischief and disturbance such as the one he complained of here had not previously occurred. * * *
>
> Even under the provision of the questioned statute it is apparent that a prosecution is dependent upon the will of the proprietor, for only after he has ordered the intruder to relinquish possession of his place of business does a violation of the statute occur. The state, therefore, without the exercise of the pro-

> prietor's will can find no basis under the statute to prosecute.
>
> These facts lead us to the conclusion that the existence of a discriminatory design by the state, its officers or agents, or by its established policy, assuming such could have been shown, would have had no influence upon the actions of McCrory's. The action of bringing about the arrest of the defendants, then, was the independent action of the manager of the privately owned store, uninfluenced by any governmental action, design, or policy—state or municipal—and the arrest was accomplished in keeping with McCrory's business practice established and maintained long before the occasion which defendants seek to associate with a discriminatory design by the state. * * *

The court further held that no constitutional provision prevented a proprietor of a restaurant from refusing service on the basis of race. It said (L. 148):

> The defendants have sought to show through evidence adduced at the trial that there is no integration of the races in eating places in New Orleans and, therefore, the custom of the state is one that supports segregation and hence state action is involved. * * *

In answer to this contention, the court stated that "segregation of the races * * * is not required by any * * * law of the State * * * but is the result of the business choice of the individual proprietors, both white and Negro, catering to the desires and wishes of their customers, regardless of what may stimulate and form the basis of the desires" (L. 148).

### 3. GOBER V. CITY OF BIRMINGHAM, NO. 66

*a. Statutes Involved.*—Section 369 of the General City Code of Birmingham, Alabama (1944), provides:

> *Separation of races.*—It shall be unlawful to conduct a restaurant or other place for the serving of food in the city, at which white and colored people are served in the same room, unless such white and colored persons are effectually separated by a solid partition extending from the floor upward to a distance of seven feet or higher, and unless a separate entrance from the street is provided for each compartment.

Petitioners were convicted of violating Section 1436 of the General City Code of Birmingham, Alabama (1944), which provides:

> *After warning.*—Any person who enters into the dwelling house, or goes or remains on the premises of another, after being warned not to do so, shall on conviction, be punished as provided in Section 4, provided, that this Section shall not apply to police officers in the discharge of official duties.

*b. The Facts.*—This case involves ten different petitioners. On March 31, 1960, the petitioners, in five groups of two, entered five department stores in the City of Birmingham. The facts relating to each of the cases are as follows:

(i) *Gober* and *Davis.*—Petitioners entered Pizitz's Department Store in Birmingham, Alabama (G. 43, 50). Petitioner Davis purchased stocks, toothpaste, and a handkerchief (G. 43). They then proceeded to the mezzanine lunch counter where they attempted to

order, but were ignored by the waitresses (G. 44). Although only white persons were seated at the lunch counter at the time, there was no sign indicating that the counter was reserved for whites (G. 44, 50). Petitioners were approached by Mr. Pizitz, assistant to the president of the store. Pizitz, who did not identify himself to petitioners, told them that Negroes were served elsewhere in the store (G. 23, 44–45). They were not directly asked to leave the store or the area in which they were sitting (G. 45). Mr. Pizitz's conversation with petitioners was described as follows (G. 23–24):

> He asked the defendants to leave the tea room area, told them that they could be served in the Negro restaurant in the basement.
>
> * * * * *
>
> He told them that they couldn't be served there and we had facilities in the basement to serve them. * * * He told them it would be against the law to serve them there. * * *

Mr. Gottlinger, the controller of Pizitz's, testified that no official of Pizitz called the police (G. 26). He also testified that no official of the company filed a complaint (G. 27).

Police Officer Martin of the Birmingham Police made the arrests (G. 19). He had received a report from a superior officer that there was a disturbance at Pizitz's (G. 19). He went to the dining area, found it closed to customers, and saw two Negro men seated and conversing together (G. 18–19). Martin heard no one speak to petitioners (G. 19). Following the direction of his superior, and without

himself warning petitioners, Martin placed them under arrest and charged them with trespassing after warning (G. 20).

(ii) *Hutchinson* and *King*.—Petitioners took seats at tables in the mezzanine dining area at Loveman's Department Store (G. 107, 115). Loveman's is a general department store and invites Negro trade in all departments with the exception of dining facilities (G. 114, 120). The dining room is a concession run by the Price Candy Company but follows Loveman's policies and regulations (G. 114).[15]

Soon after petitioners were seated, Mr. Kidd, a member of the store's protective department, appeared.[16] At the trial, he described what occurred in these terms (G. 115):

> There was two colored boys sitting on the mezzanine and I notified the people who were milling around, I notified all of the people, white people, to leave as we were closing the mezzanine in their presence—I did not directly speak to the two colored boys who were sitting at a table * * *.[17]

Mr. Kidd announced three times that the dining area was closed and put up signs to that effect (G.

[15] Mr. Schmid, the dining area concessionaire, testified that he knew of no dining facilities in Loveman's for Negroes (G. 113–114). However, Mr. Kidd of Loveman's protective department testified that the store did have separate dining facilities for Negroes (G. 119).

[16] Apparently, a restaurant employee called the protective department (G. 112). According to Mr. Schmid, this had been done since, "naturally," there was a "disturbance of the peace" (G. 112). The only actual disturbance described, however, was that "* * * the waiters went off the floor" (G. 112).

[17] Mr. Schmid likewise did not speak to petitioners (G. 110).

116).[18] About forty or fifty people were seated at the time these announcements were made, and some of them apparently stayed and finished their lunches (G. 111).

About twenty-five white patrons were seated when the police arrived, but none were arrested (G. 113).[19]

There is nothing in the record to indicate who called the police.[20] Police officer Martin, who arrested petitioners, had been told by a motorcycle policeman to go to Loveman's (G. 107). At the dining area, he observed a rope tied from one post to another and a sign stating that the area was closed (G. 107). He saw two Negro men at a table but had no conversation with them "other than to tell them they were under arrest" (G. 107). Officer Martin did not know of his own personal knowledge that anyone from Loveman's had asked petitioners to leave but believed that his superior officer knew this (G. 108).[21] Martin

[18] When asked what caused him to close the lunchroom, Kidd testified: "The commotion that was on the mezzanine. I did not know what was the cause of the commotion. When I began closing the place down then I noticed after the crowd had dispersed that the two colored boys were occupying a table" (G. 117). The commotion Kidd referred to was the people standing up and milling around (G. 117).

[19] Mr. Kidd testified, however, that everyone left immediately when he announced the closing of the lunch-room (G. 118).

[20] Mr. Schmid did not know who called the police and testified that his secretary and cashier had instructions to call the store detective in case of disturbances (G. 112).

[21] Apparently at about the time of the arrest, Police Lieutenant Purvis approached Mr. Schmid and stated that "someone called us that you had two people in here that were trying to be served * * *" (G. 112). Schmid pointed to petitioners (G. 112).

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charged petitioners with trespass after warning (G. 109).

(iii) *Parker* and *West*.—Petitioners entered Newberry's, a variety store open to the general public (G. 158, 165). There are two lunch counters in Newberry's for white customers—one on the first floor where these "sit-ins" occurred and one in the basement (G. 163). There is a Negro lunch counter on the fourth floor which has a "for colored only" sign (G. 163, 166).

At least one of the petitioners made purchases of paper and books (G. 170). They then sat at the lunch counter (G. 158–159). No sign at the lunch counter indicated that it was reserved for whites (G. 166, 171). When Mrs. Gibbs, the store detective, saw the petitioners, she (G. 162):

> * * * went over to the lunch counter * * * and identified myself and told them that they would have to leave, they couldn't be served there, but if they would go to the fourth floor we have a snack bar for colored there and they would be served on the fourth floor.

Assistant Store Manager Stallings also spoke with petitioners (G. 164):

> Well I asked them, I said, "You know you can't do this." I said, "We have a lunch counter up on the fourth floor for colored people only. We would appreciate it if you would go up there."

Mr. Stallings did not call the police, did not make a complaint to the police, and did not know whether

anybody else did[22] (G. 165). Police officer Myers was directed by a radio call from police headquarters to proceed to Newberry's (G. 158–159). Myers understood that a fellow officer had received a complaint from a Mr. Stallings, whose capacity at the store—or even whether he was an employee of Newberry's—Myers did not know (G. 160–161). At Newberry's, he encountered something "out of the ordinary," *viz.*, "[t]wo colored males were sitting at the lunch counter" (G. 158). Myers did not speak with petitioners nor did he witness a conversation among petitioners and any store employee (G. 159). Nevertheless, Myers arrested petitioners for trespass after warning.[23]

(iv) *Sanders* and *Westmorcland*.—Petitioners entered the Kress dime store in Birmingham, a general department store soliciting the trade of the general public (G. 214–215). It has no food service facilities for Negroes (G. 215), who are, however, invited to buy food and bakery items to carry out (G. 218). White and Negroes purchase from the same counters at other departments (G. 216).

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[22] Stallings, when asked "Did any other official at Newberry's call the police?," replied: "Someone, now I don't remember who this person was, but someone said to me that we called the police. I don't know who it was. I don't remember that" (G. 165).

[23] Petitioner West testified that when officer Myers arrived on the scene he began to motion white people away from the lunch counter but all of them did not leave (G. 172). "After he started motioning the white people away," West stated, "we started to get up and when we started to get up one got me in the back or somewhere in behind. * * * After I saw him motioning other people up I said, 'Let's go.' And we started to get up" (G. 172).

After petitioners sat down at a bay in the lunch counter, Kress' lunch counter manager told them "we couldn't serve them and they would have to leave" (G. 211). After the manager turned out the lights in the bay in which petitioners were sitting, petitioners moved to another (G. 211). The manager then closed down all the bays and turned out all the lights in the bays (G. 212).

Officer Caldwell, upon receiving a call to go to Kress' store, went to the basement and observed that the lunchroom was closed and "two black males" were "sitting there" (G. 209). The manager then informed the policeman, in the presence of petitioners, that "they couldn't be served and he had turned the lights out and closed the counter" (G. 209).[24] Two policemen entered the bay where petitioners were seated and twice asked them to get up (G. 212). After additional policemen entered, officer Caldwell arrested petitioners, although no one had asked him to do so (G. 209, 210), and the officers escorted petitioners from the store (G. 212).[25]

(v) *Walker* and *Willis*.—Petitioner Walker entered Woolworth's store to purchase handkerchiefs and a birthday gift for a friend (G. 255). Petitioner Willis purchased various non-food items (G. 255).

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[24] The officer did not hear anyone tell petitioners to leave the counter (G. 210). The counter manager had not called the police, requested an arrest or signed a complaint. Nor did the store manager do any of these things in the counter manager's presence (G. 213-214).

[25] A woman already seated at the counter remained after the "closing" and, so far as the counter manager knew, was not arrested (G. 217-218).

They were not refused service at any non-food counter (G. 257–258), and Walker testified that he "really expected service" at the lunch counter because he "had been served prior to coming to the [lunch] counter" (G. 259).

Petitioners proceeded to the lunch counter and sat down (G. 255). There were no signs indicating that the lunch counter was reserved for whites (G. 257). A waitress said to petitioner, "I'm sorry I can't serve you," but they remained seated at the counter (G. 256).

Two police officers arrived in response to a call from the Birmingham police radio (G. 252). Mrs. Evans, the manager of the lunch counter, informed one officer that "she had told the boys to leave, that the place was closed, and the second time she directed her conversation to the defendants and told them it was closed and they would have to leave, she would not serve them" (G. 252–253).[26] Officer Casey testified that no one directly instructed the police to arrest petitioners (G. 253–254), but that he understood Mrs. Evans' "complaint" that "she wanted the boys out of the store" as a request to remove them (G. 253). When asked "did you take it upon yourself to make these arrests," officer Casey replied: "I did under authority of the City of Birmingham" (G. 253).

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[26] This was the testimony of police officer Casey. Petitioner Walker, on the other hand, testified that no one connected with the store management had ever asked petitioners to leave, and that he did not see Mrs. Evans at the store at the time of the incident (G. 256).

Some white customers were ordered to leave the counter, and one was forced to do so by the police but was not arrested (G. 256). Finally a policeman "asked [petitioners] to leave," saying, "Let's go," and informed them that they were under arrest (G. 257). Officer Casey testified that at the time of arrest or shortly thereafter he informed petitioners that they had been arrested for trespass after warning (G. 254).

The complaint against each of the ten petitioners charged that he or she "did go or remain on the premises of another, said premises being the area used for eating, drinking, and dining purposes and located within the building commonly and customarily known as * * * [the store in question] after being warned not to do so, contrary to and in violation of Section 1436 of the General City Code of Birmingham of 1944" (G. 2–3, 73–74, 93, 129, 145, 183, 195–196, 225, 237, 267). Petitioners were convicted in the Recorder's Court of the City of Birmingham. On appeal, they then received successive trials *de novo* in the Circuit Court of Jefferson County with the same judge, prosecutor and defense counsel.

At the first trial (*Gober* and *Davis*), petitioners tried to question a store official concerning the segregation ordinance of the City of Birmingham (Section 369 of the City Code of Birmingham) (G. 24–25):

> Mr. HALL [counsel for petitioners]. * * * It is our theory of this case it is one based simply on the City's segregation ordinance and Mr. Gottlinger, Mr. Pizitz, the police officers and everybody involved acted simply because of the

segregation law and not because it was Pizitz policy.

* * * * *

Mr. HALL. As I understand it it is the theory of the City's case, it is trespass after warning. Our contention is that that is not a fact at all, it is simply an attempt to enforce the segregation ordinance and we are attempting to bring it out.

The COURT. Does the complaint cite some statute?

Mr. HALL. Trespass after warning. If we went only on the complaint it would seem that some private property has been abused by these defendants and that the owner of this property has instituted this prosecution. From the witness' answers it doesn't seem to be the case. It seems it is predicated on the segregation ordinance of the City of Birmingham rather than on the trespass. So what we are trying to bring out is whether or not the acts of Pizitz were based on the segregation ordinance or something that has to do with trespass on the property.

The court refused to permit the store official to be interrogated about his knowledge of the law, on the ground that the reason that the store excluded petitioners was immaterial (G. 25–26). During the *Parker* and *West* trial, petitioners' counsel likewise attempted to establish that petitioners were arrested because of the segregation policies of the City of Birmingham and not because of any policy of the store (G. 166–168). The court again ruled that this line of inquiry was not "competent" (G. 168).

Petitioners were again adjudged guilty in the Circuit Court and, in a common sentencing proceeding, were fined $100 and given thirty days' hard labor, with additional time for failure to pay the fine and court costs[27] (G. 10–11, 82, 101–102, 137–138, 153, 188, 203–204, 230, 245–246, 272). The Alabama Court of Appeals, affirming the conviction, wrote an opinion for the first case, *Gober* v. *State of Alabama,* and affirmed all others in brief *per curiam* orders citing *Gober* (G. 57–64, 88, 124, 144, 178, 194, 220, 236, 262, 278). In its opinion in *Gober,* the Court of Appeals stated that 'there is no question presented in the record before us, by the pleading, of any statute or ordinance requiring the separation of the races in restaurants. The prosecution was for a criminal trespass on private property" (G. 63). The court noted that petitioners were licensees and entered the premises by implied invitation and that, under such circumstances, the owners of the premises had the right to place limitations as they saw fit (G. 63). "It is fundamental," the court held, "and requires no citation of authority, the grantor of a license, which has not become coupled with an interest, may revoke the license at will" (G. 64). The Supreme Court of Alabama denied certiorari in all the cases by identical orders (G. 69, 92, 128, 144, 182, 194, 224, 236, 266, 278).

[27] For example, petitioner Gober was sentenced to 52 days of hard labor for failure to pay his $100 fine and the $5 costs accrued in the Recorder's Court, and to an additional 60 days of hard labor for failure to pay the costs accrued in the Circuit Court. The State of Alabama also was authorized to recover from Gober the costs expended for feeding Gober while he was in jail (G. 11; see also G. 82, 101–102, 137–138, 153, 188, 203–204, 230, 245–246, 272).

4. SHUTTLESWORTH V. CITY OF BIRMINGHAM, NO. 67

*a. Statutes involved.*—Petitioners were convicted of violating Section 824 of the General City Code of Birmingham, Alabama (1944). Section 824 provides:

> It shall be unlawful for any person to incite, or aid or abet in, the violation of any law or ordinance of the city, or any provision of state law, the violation of which is a misdemeanor.

Sections 369 and 1436 of the Birmingham code, which are also involved, are set forth above at page 22.

*b. The Facts.*[25]—The record shows that James Gober (one of the petitioners in the *Gober* case (see *supra*, pp. 22–24) went to petitioner Shuttlesworth's home on March 30, 1960 (S. 27–28). Shuttlesworth, his wife, several students fro n Daniel Payne College, and petitioner Billups, who had driven one of the students to Shuttlesworth's home, were present (S. 28, 31). Petitioner Shuttlesworth "asked for volunteers to participate in the sit down demonstrations" (S. 29). A "list," not otherwise described, was prepared (S. 30). One student "volunteered to go to Pizitz [a department store] at 10:30 [a.m.] [the next day] and take part in the sit down demonstrations" (S. 31). Shuttlesworth "didn't say that he would furnish Counsel but told him or made the announcement at that time that he would get them out of jail" (S. 31–32).

[25] The record of the trial court proceedings in this case consists largely of testimony of a city detective in the Circuit Court of Jefferson County describing the evidence adduced at an earlier trial of petitioner Shuttlesworth for the offense in the city recorder's court. Objections were regularly made to this testimony by the defendants on hearsay grounds (see, *e.g.*, S. 24–25).

Gober and other students present at the meeting did participate in a "sit-in" demonstration, not otherwise described, on the next day, March 31, 1960 (S. 33).

Petitioners Shuttlesworth and Billups were charged with violating Section 824 of the Code of Birmingham, *supra,* by inciting or aiding or abetting "another person to go or remain on the premises of another after being warned not to do so," in violation of Section 1436 of the Birmingham Code, *supra* (S. 2, 53). They were convicted by the city recorder's court. On appeal to the Circuit Court of Jefferson County, they were separately tried *de novo.* Petitioners Shuttlesworth and Billups were again convicted by the court sitting without a jury, and sentenced, respectively, to 180 days hard labor and a $100 fine, and 30 days' hard labor and a $25 fine (S. 40).

The convictions were affirmed by the Court of Appeals of Alabama. The court stated, in the *Shuttlesworth* case, that "'[e]veryone who incites any person to commit a crime is guilty of a common law misdemeanor, even though the crime is not committed'" (S. 44). It also held (S. 44):

> There is no question of the restriction of any right of free speech or other assimilated right derived from the Fourteenth Amendment, since the appellant counseled the college students not merely to ask service in a restaurant, but urged, convinced and arranged for them to remain on the premises presumably for an indefinite period of time. There is a great deal of analogy to the sit-down strikes in the automobile industry referred to in *National Labor Relations Board* v. *Fansteel Metallurgical Corp.,* 306 U.S. 240.

In the *Billups* case, the Court of Appeals simply adopted the findings of fact and the legal conclusions set forth in the *Shuttlesworth* case (S. 67). On September 25, 1961, the Supreme Court of Alabama denied writs of certiorari in both cases, and on November 16, 1961, rehearings were denied (S. 46, 69).

5. PETERSON V. CITY OF GREENVILLE, NO. 71

*a. Statutes Involved.*—Section 31–8, Code of Greenville, South Carolina, 1953, as amended in 1958, provides:

> It shall be unlawful for any person owning, managing or controlling any hotel, restaurant, cafe, eating house, boarding house or similar establishment to furnish meals to white persons and colored persons in the same room, or at the same table, or at the same counter; provided, however, that meals may be served to white persons and colored persons in the same room where separate facilities are furnished. Separate facilities shall be interpreted to mean:
>
> (a) Separate eating utensils and separate dishes for the serving of food, all of which shall be distinctly marked by some appropriate color scheme or otherwise;
>
> (b) Separate tables, counters or booths;
>
> (c) A distance of at least thirty-five feet shall be maintained between the area where white and colored persons are served;
>
> (d) The area referred to in subsection (c) above shall not be vacant but shall be occupied by the usual display counters and merchandise found in a business concern of a similar nature;
>
> (e) A separate facility shall be maintained and used for the cleaning of eating utensils and dishes furnished the two races.

Petitioners were convicted of violating Section 16-388, Code of Laws of South Carolina, 1952, as amended in 1960, which provides:

> Any person:
>
> (1) Who without legal cause or good excuse enters into the dwelling house, place of business or on the premises of another person, after having been warned within six months preceding, not to do so or
>
> (2) who, having entered into the dwelling house, place of business or on the premises of another person without having been warned within six months not to do so, and fails and refuses, without good cause or excuse, to leave immediately upon being ordered or requested to do so by the person in possession, or his agent or representative,
>
> Shall, on conviction, be fined not more than one hundred dollars, or be imprisoned for not more than thirty days.

*b. The Facts.*—At about 11:00 a.m. on August 9, 1960, petitioners, ten Negro students, took seats at the lunch counter at the Kress department store in Greenville, South Carolina, and requested service (P. 1, 19, 36). The Kress store in Greenville is open to the general public; it has fifteen to twenty departments and sells over 10,000 items (P. 21). Negroes and whites are invited to purchase and are served alike, except that Negroes are not served at the lunch counter (P. 21).

When petitioners requested service at the lunch counter, they were told by a Kress employee, "I'm sorry, we don't serve Negroes" (P. 19, 36). Petitioners refused to leave, and G. W. West, the Kress

manager, directed that the police be called (P. 22).[29]

Captain Bramlette of the Greenville Police Department received the call to proceed to the Kress store (P. 7). He was told that there were young colored boys and girls seated at the lunch counter (P. 10). Captain Bramlette testified that he did not know the origin of the telephone call (P. 7, 10). When Captain Bramlette, with several city policemen, arrived at the store, he found two agents of the State Law Enforcement Division already present at the lunch counter (P. 7).[30] In the presence of the police officers, the lunch counter lights were turned off and manager West requested "everybody to leave, that the lunch counter was closed" (P. 19, 15).[31] At petitioners' trial, their counsel was denied permission to ascertain whether this request followed arrangement or agreement with the police (P. 23, 24–25). After

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[29] Doris Wright, one of the petitioners, testified that on an earlier occasion she had spoken to the Kress manager about the stores' policy of lunch counter segregation and was assured that charges would not be pressed against Negroes who sought service (P. 38).

[30] The South Carolina Law Enforcement Division was organized to assist local law enforcement officers. Officer Hillyer of the Division, present at the time of the incident, testified that his immediate superior is Chief J. P. Strom, who is directly under the authority of the Governor of South Carolina (P. 43).

[31] Petitioner Wright testified that the request to leave was made by the police and not by Mr. West (P. 37). She denied that Mr. West asked her or any of the other petitioners to leave (P. 41). When asked, "Of course, you are not in position to say whether or not Mr. West may have made a request to some of the other nine?" she replied, "Yes, I am, Mr. West, come from the back of the store, at the time we were being arrested and were told that the lunch counter was closed" (P. 41).

about five minutes,[32] during which petitioners had made no attempt to leave the lunch counter, Captain Bramlette placed them under arrest for trespassing (P. 19).[33] Store manager West did not request that petitioners be arrested (P. 16, 24).

White persons were seated at the counter when the announcement to close was made but none were arrested (P. 19). Mr. West testified that, when the lights went out, the white customers departed (P. 19). But a white customer testified that, at the time of the arrests, some white persons were still seated at the counter (P. 30–31). As soon as petitioners were removed by the police, the lunch counter was reopened (P. 23).

Manager West testified that he closed the counter because of local custom and because of the Greenville city ordinance requiring racial segregation in eating facilities (P. 23):

> Q. Mr. West, why did you order your lunch counter closed?
>
> A. It's contrary to local custom and it's also the ordinance that has been discussed.
>
> Q. Do I understand then further, that you are saying that the presence of Negroes at your lunch counter was contrary to customs?
>
> A. Yes, sir.
>
> Q. And that is why you closed your lunch counter?

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[32] There is some conflict in the record regarding the time lapse between the announcement that the counter was closed and the arrests (see P. 29, 37, 38, 45).

[33] Four other Negroes were also arrested but their cases were disposed of by the juvenile authorities (P. 7).

A. Yes, sir, that's right.[34]

The record is conflicting as to whether Captain Bramlette thought he was acting under the Greenville segregation ordinance or the State trespass law. At one point, the Captain testified that he did not have the city ordinance in mind when he went to Kress but was thinking of the recently passed State trespass statute (P. 11). When asked however, why he arrested petitioners, he said (P. 15):

> A. Under the State Law just passed by the Governor relative to sit-down lunch counters in Greenville, I enforced this order.
>
> Q. But the State Law that just passed and signed by the Governor in May doesn't mention anything about Negroes sitting at lunch counters, does it?
>
> A. It mentions sit-ins.

However, after refreshing his recollection, the Captain conceded that the new State law did not mention sit-ins (P. 15). He further testified as follows (P. 16–17):

> Q. Did the manager of Kress', did he ask you to place these defendants under arrest, Captain Bramlette?
>
> A. He did not.
>
> Q. He did not?
>
> A. No.
>
> Q. Then why did you place them under arrest?
>
> A. Because we have an ordinance against it.
>
> Q. An ordinance?

[34] Mr. West testified (P. 21) that the policy of following local custom was prescribed by Kress' headquarters.

A. That's right.

Q. But you just now testified that you did not have the ordinance in mind when you went over there?

A. State law in mind when I went up there.

Q. And that isn't the ordinance of the City of Greenville, is it?

A. This supersedes the order for the City of Greenville.

Q. In other words, you believe you referred to an ordinance, but I believe you had the State statute in mind?

A. You asked me have I, did I have knowledge of the City ordinance in mind when I went up there and I answered I did not have it particularly in my mind, I said I had the State ordinance in my mind.

Q. I see and so far this City ordinance which requires separation of the races in restaurants, you at no time had it in mind, as you went about answering the call to Kress' and placing these people under arrest?

A. In my opinion the State law was passed recently supersedes our City ordinance.[35]

Petitioners were tried and convicted in the Recorder's Court of Greenville before the City Recorder, sitting without a jury, of violation of the South Carolina trespass law and sentenced to pay a fine of one hundred dollars or serve thirty days in the city jail (P. 47). Petitioners appealed to the Greenville County Court, and their appeal was dismissed on

[35] Although the trial judge appears to have denied petitioners' motion to make the Greenville segregation ordinance a part of the record (P. 46–47), it nevertheless has been incorporated into the record (P. 49).

March 17, 1961 (P. 50). That court noted that the trespass statute was merely a reenactment of the common law which permits a property owner to order any person from his premises whether they be an invitee or an uninvited person and that the constitutionality of the statute was unquestioned (P. 50–51). The court rejected petitioners' contention that they had a right to be served (P. 52).

On November 10, 1961, the Supreme Court of South Carolina affirmed the judgment and sentences (P. 55). It held that the operator of a privately owned business may accept some customers and reject others on purely personal grounds, in the absence of a statute to the contrary (P. 58). The court also held that there was nothing in the record to substantiate a claim that petitioners were actually prosecuted under the Greenville segregation ordinance (P. 59). The Supreme Court denied rehearing on November 30, 1961 (P. 62).

## ARGUMENT

### INTRODUCTION AND SUMMARY

We believe it important at the outset to define, and if possible limit, the issue in these cases.

The Fourteenth Amendment provides:

> * * * nor shall any State * * * deny to any person within its jurisdiction the equal protection of the laws.

In the *Civil Rights Cases*, 109 U.S. 3, decided shortly after the adoption of the Fourteenth Amendment, this Court held that the Amendment drew a fundamental distinction between a State's denial of

equal protection of the laws and discrimination by private individuals, however odious. "It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the Amendment" (*id.*, p. 11).

For a century, this basic postulate has been consistently applied in the courts. This brief does not question its validity. On the one hand, a State cannot constitutionally prohibit association between Negroes and whites, be it in a public restaurant or elsewhere. On the other hand, to cite an example, if a private landowner should invite all of his neighbors to use his swimming pool at will and then request one of the invitees to leave because of his race, creed or color, the decision would be private and, however unpraiseworthy, not unconstitutional. Furthermore, we take it that there would be no denial of equal protection if the State made its police and legal remedies available to the owner of the swimming pool against any person who came or remained upon his property over his objection. For, in a civilized community, where legal remedies have been substituted for force, private choice necessarily depends upon the support of sovereign sanctions. In such a case, the law would be color-blind and it could not be fairly said, we think, that the State had denied anyone the equal protection of its laws.

With respect to these "sit-in" cases it has been argued most broadly that the requisite State action is to be found in the arrests by the police, the prosecutions and the convictions, and that since discrimi-

nation against Negroes resulted from this State action, it violates the constitutional guarantee of equal protection of the laws. Cf. Henkin, *Shelley* v. *Kraemer: Notes for a Revised Opinion,* 110 U. of Pa. L. Rev. 473. Our example of the private residence and swimming pool is to be distinguished (the argument runs) upon the ground that, although that case too would involve State action and thus raise a federal constitutional question if there was an arrest and prosecution, nevertheless, the owner's right of privacy should outweigh the neighbor's claim to be free from racial discrimination. Against this, the States will no doubt argue that the two cases are alike because the State does not deny equal protection of the law when it indiscriminately offers to support the decision of the private landowner without regard to the landowner's reasons.

We believe that this broad issue need not, and should not, be decided in the cases at bar. We express no opinion upon it. We assume *arguendo* that in the absence of other grounds for holding the State responsible the principle invoked by the States is applicable to uninvited entrants upon business property, where the business is neither subject to a legal duty to serve the public (as in the case of inns and common carriers) nor owned or managed by one exercising sovereign functions. In our view, however, the principle is not applicable to the present cases.

One significant difference is that these cases do not involve in any substantial sense the landowner's privilege of deciding whom he will bar from his

premises and whom he will invite upon them as social guests or business visitors. In these cases the Negroes were invited into the store and were lawfully on the premises. In the *Lombard* case, for example, McCrory's Five and Ten Cent Store caters to the general public, both whites and colored, and even at the lunch counter restricted to white patronage there was no sign indicating the restriction. The situation was substantially the same in *Peterson, Gober* and *Shuttlesworth*. The all-white lunch room in *Avent* was expressly restricted to "invited guests," which perhaps impliedly excluded the petitioners in that case, but all other portions of the store were open to Negroes and their patronage was solicited without discrimination. The only real restriction, therefore, was a policy of refusing to allow white and colored to break bread together. Although this restriction can be cast in the language of the law of trespass by saying that the owner may revoke the consent to enter, the terminology cannot conceal the fact that the sole reason for revocation was petitioners' refusal to accept a stigma of social inferiority. While this circumstance may not directly bear upon the question of the States' responsibility, it plainly shows that no substantial claim to constitutional rights in private property is involved in these cases. Cf. *Marsh* v. *Alabama*, 326 U.S. 501, 505–507.[36]

[36] Also, Mr. Justice Frankfurter, concurring, said "And similarly the technical distinctions on which a finding of 'trespass' so often depends are often too tenuous to control [a] decision regarding the scope of the vital liberties guaranteed by the Constitution." 326 U.S. at 511. Cf. *Shelley* v. *Kraemer*, 334 U.S. 1, 22; *Barrows* v. *Jackson*, 346 U.S. 249, 260.

Still more important in the cases at bar, the States, which instituted the prosecutions, share the responsibility for the invidious discrimination, so that the State denial of equal protection does not depend upon the arrests and prosecution alone. In the *Avent, Gober* and *Peterson* cases, municipal ordinances required racial segregation in public eating places. In the *Shuttlesworth* case, petitioners were convicted of aiding and abetting Negroes to sit in lunch counters reserved for whites in a city where an ordinance required segregation in restaurants. In the *Lombard* case, the State's laws and policies, effectively and persistently implemented throughout the community, had a similar effect, albeit there was no ordinance in terms requiring the exclusion of Negroes from the establishment in question.

Accordingly, we submit that the only question now requiring decision is whether, judged against the background of the owner's willingness to serve Negroes in other parts of the stores, the States' influence upon the owner's decision to discriminate in serving food, through explicit segregation ordinances in four cases and through a general policy of promoting racial segregation in the fifth, was sufficient on these records to make the States' activities, taken as a whole, a denial of equal protection of the laws. If so, the resulting convictions must be reversed.

It is one thing for the State to enforce, through the laws of trespass, exclusionary practices which rest simply upon individual preference, caprice or prejudice. It is quite another for the State, exercis-

ing as it does immeasurable influence over individual behavior, to induce racial segregation and then proceed to implement the acts of exclusion which it has brought about. If the State, by its laws, actions, and policies, causes individual acts of discrimination in the conduct of a business open to the public at large, the same State, we believe, cannot be heard to say that it is merely enforcing, in even-handed fashion, the private and unfettered decisions of the citizen.

To sustain the judgments of conviction in the instant cases in the face of the segregation ordinances and official policies, the Court, we believe, would be obliged, at a minimum, to find (1) that the acts of discrimination were shown not to be a result of the State's laws and policies or of the actions of State officials and (2) that the petitioners, when ordered to leave the premises in question, were on notice that the proprietor was acting to assert his own rights, rather than in obedience to the State's unconstitutional command. In these cases, neither finding can be made. For aught that appears, the State, in each instance, laid the foundation for the criminal conviction by its own mandates of segregation.

## I

### THE CONVICTIONS OF THE PETITIONERS IN *Avent, Gober, Shuttlesworth* AND *Peterson* VIOLATE THE FOURTEENTH AMENDMENT BECAUSE IT MUST BE CONCLUDED THAT THE FORCE OF MUNICIPAL LAWS CAUSED THE PROPRIETORS TO DISCRIMINATE

While the petitioners in *Avent, Gober,* and *Peterson* were convicted of trespassing for refusing to leave racially segregated lunch counters, these cases

cannot be divorced from the fact that the allegedly criminal acts occurred in communities which had ordinances affirmatively requiring racial segregation at establishments where food is served. (The *Shuttlesworth* case, involving a charge of aiding and abetting the violation of Alabama's criminal trespass statute, turns on the same considerations which govern the *Gober* case.) The City of Durham, North Carolina (see *supra*, pp. 6–7),[37] the City of Birmingham, Alabama (see *supra*, p. 22), and the City of Greenville, South Carolina (see *supra*, pp. 35–36), all had ordi-

[37] In the *Gober* case, the Alabama Supreme Court held that the Birmingham ordinance was not properly pleaded and therefore was not before the court on appeal. This reasoning is plainly insubstantial, since it is well established that the Alabama courts can take judicial notice of municipal ordinances. See 7 Code of Alabama (1940), § 429(1); *Shell Oil* v. *Edwards*, 263 Ala. 4, 81 So. 2d 535; *Smiley* v. *City of Birmingham*, 255 Ala. 604, 605, 52 So. 2d 710; *Monk* v. *Birmingham*, 87 F. Supp. 538 (N.D. Ala.), affirmed, 185 F. 2d 859 (C.A. 5), certiorari denied, 341 U.S. 940. Therefore, the ordinance was properly before the Alabama courts and may be considered by this Court.

We recognize that the existence of the Durham segregation ordinance was not called to the attention of the courts below and that no argument based on that ordinance was advanced in the petition for certiorari in the *Avent* case. Nevertheless, on occasion, this Court has decided cases on a ground not raised below. See, *e.g.*, *Terminiello* v. *Chicago*, 337 U.S. 1. This practice is particularly appropriate where it furthers this Court's historic refusal to adjudicate far-reaching constitutional questions except where such adjudication is absolutely necessary to the decision. See, *e.g.*, the concurring opinion of Mr. Justice Brandeis in *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 345–348. Accordingly, should this Court conclude that the existence of the segregation ordinances in

nances forbidding eating establishments from serving whites and Negroes on a nonsegregated basis. We submit that the decision of restaurant owners to discriminate under the compulsion of these ordinances constitutes State action in violation of the Fourteenth Amendment. From that, it necessarily follows that the arrest and conviction of persons for refusing to obey this decision to discriminate likewise violates the command of the Constitution.

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*Gober* and *Peterson* requires reversal of the convictions in these cases, we believe that a similar result should follow in *Avent*. Such a reversal in *Avent* would avoid consideration of any new constitutional issues not already decided in *Gober* and *Peterson*.

If this Court should conclude that it ought not take judicial notice of the Durham ordinance in deciding the case on the merits and that the constitutional issues raised, absent the ordinance, go substantially beyond anything required to be decided in the companion cases, it may wish to consider two other dispositions of the *Avent* case. One would be to remand the case to the Supreme Court of North Carolina for further consideration in the light of the decisions in any cases in which the segregation ordinances were given decisive significance. That court's rule with respect to judicial notice (see *Fulghum* v. *Town of Selma*, 238 N.C. 100, 76 S.E. 2d 368, 371; *State* v. *Clyburn*, 247 N.C. 455, 101 S.E. 2d 295, 300) might properly be affected by awareness of possible constitutional implications. And this Court has authority to "require such further proceedings to be had as may be just under the circumstances." 28 U.S.C. 2106. The other course would be to consider whether the writ was providently granted in the *Avent* case. The well-established practice of refusing to decide difficult constitutional issues upon an inadequate record or in cases that do not require their decision would seem equally applicable to cases in which the constitutional issue is raised only because one of the parties failed to take advantage of another available defense. Cf. *Rice* v. *Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70.

A. A MUNICIPAL ORDINANCE WHICH REQUIRES RACIAL SEGREGATION IN RESTAURANTS VIOLATES THE FOURTEENTH AMENDMENT

The municipal ordinances involved in these cases are clearly unconstitutional. It is a fundamental principle of our constitutional system that the Fourteenth Amendment prohibits state-sanctioned racial segregation. This principle was recently applied to restaurants in *Turner* v. *City of Memphis*, 369 U.S. 350. There, a statute authorized the State Division of Hotel and Restaurant Inspection of the State Department of Conservation to issue "such rules and regulations * * * as may be necessary pertaining to the safety and/or sanitation of hotels and restaurants * * *" and made violation of such regulations a misdemeanor (*id.* at 351). The resulting regulation provided that "[r]estaurants catering to both white and negro patrons should be arranged so that each race is properly segregated" (*ibid.*). This Court left no doubt that such State-required racial discrimination was unconstitutional, stating (*id.* at 353):

> * * * our decisions have foreclosed any possible contention that such a statute or regulation may stand consistently with the Fourteenth Amendment. *Brown* v. *Board of Education*, 347 U.S. 483; *Mayor & City Council* v. *Dawson*, 350 U.S. 877; *Holmes* v. *City of Atlanta*, 350 U.S. 879; *Gayle* v. *Browder*, 352 U.S. 903; *New Orleans City Park Improvement Assn* v. *Detiege*, 358 U.S. 54. * * *

See also *Bailey* v. *Patterson*, 369 U.S. 31; *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715; *Morgan* v. *Virginia*, 328 U.S. 373; *Baldwin* v. *Morgan*, 287 F. 2d 750 (C.A. 5).

B. THE STATE IS RESPONSIBLE FOR THE DECISION OF THE OWNERS OF A RESTAURANT TO DISCRIMINATE ON THE BASIS OF RACE WHEN THIS DECISION IS COMPELLED BY STATE LAW

1. If the owner of an establishment requests Negroes to leave a lunch counter reserved for whites because a State law requires the owner to maintain segregation, the prosecution of Negroes for criminal trespass for refusing to leave would be an implementation of the discriminatory State statute and would therefore violate the equal protection clause of the Fourteenth Amendment. While this Court has apparently never had occasion to pass directly upon the question, the lower courts have so held. Thus, in *Williams* v. *Howard Johnson's Restaurant*, 268 F. 2d 845, 847, the Court of Appeals for the Fourth Circuit indicated that "actions * * * performed in obedience to some positive provision of state law" acquire the coloration of the State and are governed by the broad egalitarian requirements of the Fourteenth Amendment. In *Flemming* v. *South Carolina Electric and Gas Co.*, 224 F. 2d 752, the Fourth Circuit held that the racial segregation of passengers by a bus company, as required by State law, constituted action under color of State law. Similarly, the Court of Appeals for the Fifth Circuit has held that "[t]he very act of posting and maintaining separate [waiting room] facilities when done by the [railroad] Terminal as commanded by these state orders is action by the state." *Baldwin* v. *Morgan*, 287 F. 2d 750, 755 (C.A. 5). It declared (*id.* at 756):

> * * * the State may not use race or color as the basis for distinction. It may not do so by direct action *or through the medium of others*

*who are under State compulsion to do so.* * * *
(Emphasis added.)

See also the earlier *Baldwin* v. *Morgan* case, 251 F. 2d 780, 789–790 (C.A. 5); *Boman* v. *Birmingham Transit Co.*, 280 F. 2d 531 (C.A. 5).[38]

The rule enunciated in the above decisions, we believe, is clearly correct. A person who engages in racial discrimination under influence of the State's coercive authority is in no sense acting independently. Rather, he is acting in compliance with the will of the State, and the effect of his action is to carry out the State's policy of discrimination. Consequently, the discriminatory action, while performed by a private person, is a reflection of the State's law and policy. The State has "insinuated itself" into the private decision and "place[d] its authority behind discriminatory treatment based solely on color * * *" in the most forceful manner available to it, by the compulsion of its penal laws. *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 725, 727.

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[38] And see *Williams* v. *Hot Shoppes, Inc.*, 293 F. 2d 835, 845, 846 (C.A. D.C.) (Judges Bazelon and Edgerton dissenting):

"If a state statute affirmatively required restaurant owners to segregate their facilities or exclude Negro patrons, conduct of the restaurant owners caused solely by the compulsion of such a statute would be state action and would give rise to a claim for relief under [42 U.S.C.] § 1983. * * * When otherwise private persons or institutions are required by law to enforce the declared policy of the state against others, their enforcement of that policy is state action no less than would be enforcement of that policy by a uniformed officer."

The majority opinion in *Hot Shoppes* did not reach this question.

Indeed, if actions compelled by statute are not considered State action, decisions of this Court proscribing State-imposed racial segregation (see *supra*, p. 48) may be largely circumvented. For the result is that State laws compelling private persons or organizations to discriminate are enforced through parallel statutes—like the trespass and criminal mischief statutes involved here. It may be argued that no businessman is bound to discriminate because, if he disobeys a State law which commands discrimination, he can challenge the constitutionality of the statute under which he has been convicted—if need be, in this Court. But a criminal law, with the power of the State behind it, has, until it is repealed, a powerful effect of its own. Ordinary citizens do not know that a particular law is not enforced or is unconstitutional, and, even if they know, they do not lightly disregard it. In any event, regardless of the number of people who act under compulsion of a State segregation statute which is unconstitutional and therefore unenforceable, certainly in the case of those who do respond to the compulsion the consequence is an implementation of the statutory command. The use of the State's criminal law to arrest and convict Negroes for activities which, except for unconstitutional State segregation statutes, would be entirely legal—because the restaurateur would not discriminate—is surely unconstitutional.

2. We have shown that, if a restaurateur excludes Negroes because of a State statute, the State cannot convict Negroes for trespass for entering the restau-

rant. In none of these cases, we recognize, does the record contain an express and specific affirmative showing that the coercive force of the segregation ordinance was the sole reason for the proprietor's refusal to serve the various petitioners. In *Peterson* the proprietor testified that he refused service because of local custom *and* the segregation ordinance of Greenville. In *Avent* the ordinance is not mentioned in the record, but the manager acted in accordance with local custom and for reasons of "public safety." The *Gober* case presents five pairs of convictions. Petioners Gober and Davis were excluded because the proprietor felt that it would be against the law to serve them. The records in the four other trials in the *Gober* case do not record the motivation of the various proprietors.[39] In *Shuttlesworth,* the petitioners were convicted of aiding and abetting the violations of the trespass statute involved in the *Gober* case. Under Alabama law, as stated by the Alabama Court of Appeals in this case, the validity

[39] In the *Gober-Davis* trial, petitioners' attempt to secure further evidence concerning the relationship of the ordinance and the decision to discriminate was foreclosed by the rulings of the trial court that this line of inquiry was incompetent (see the Statement, *supra*, pp. 29–30). Since *Gober-Davis* was the first of a series of five trials before the same state trial judge, further efforts in the four later cases to raise the same issue would have been futile, as is shown by the court's ruling in *Parker-West* that a similar line of inquiry was impermissible. Thus, while no effort was made in the *Hutchinson-King, Sanders-Westmoreland,* or *Walker-Willis* trials to raise an issue concerning the segregation ordinance, it is fair to say that all the petitioners in *Gober* were denied an opportunity to show that the restaurateurs' decisions to discriminate were based on the Birmingham ordinance.

of the convictions depends on whether they were inciting persons to commit a crime. There is no evidence in the *Shuttlesworth* record as to the motivations of the proprietors of the establishments where the "sitting-in" occurred.

Upon each of these records the only permissible inference is that the local ordinance was such a substantial factor in the proprietor's decision that the State must share in the responsibility for the discrimination to the same extent as if the record showed that the decision of the restaurateurs to discriminate was based solely upon State law. It is not necessary that the discrimination be solely the result of the State's activities. It is enough that the State in any of its manifestations has become involved in the discrimination. See *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 722. See also pp. 59–63 *infra*.

We base our submission that the only permissible inference upon these records is one of substantial State responsibility for the proprietor's discrimination upon three lines of reasoning.

*First*, where State law requires racial segregation in all eating places and the proprietors uniformly comply, the average individual proprietor would never reach the question whether he would discriminate if left to a judgment uninfluenced by the State; and this seems true whether the owner is conscious or unconscious of the reasons for his conduct. The normal inference to be drawn from the existence of the ordinance, therefore, is that it caused the discrimination, and the State would then have to overcome the infer-

ence by showing that the decisions of the proprietors were wholly uninfluenced by the compulsion of an existing State law.

*Second,* to the extent that the records in these cases are unclear as to the motivation of the proprietors, the States had the burden of removing the ambiguity because the States themselves created it. It is a familiar principle of general applicability in our law that the party responsible for a wrong must "disentangle the consequences for which it was chargeable" or bear the responsibility for the whole. *National Labor Relations Board* v. *Remington Rand Inc.,* 94 F. 2d 862, 872. The question whether the restaurateurs were moved to act as they did because of the coercive effect of the segregation statutes would not exist except for the fact that the States passed and retained statutes which compel racial segregation and therefore violate the Fourteenth Amendment. It is clear, as we have seen, that if the proprietor discriminates as a result of the compulsion of the State, this constitutes State action. On the face of it, the decisions of the restaurateurs to discriminate were made under compulsion of explicit State statutes. Assuming that a State would be heard to deny the coercive effect of its own ordinance, there is no showing in any of these cases that the State did not cause the exclusionary act of the proprietor. In each instance, therefore, the State has failed to establish an element essential to the constitutionality of the conviction.

*Third,* even if the States had shown that the proprietor's decision to discriminate was not caused by the compulsion of the municipal ordinances, these

convictions would have to be deemed invalid because it was not also made to appear that the petitioners knew that the proprietor's decision was a purely private choice. Where discrimination appears on its face to be invalid under the Fourteenth Amendment because it is compelled by a State law, Negroes should not be required to investigate the true motive of the restaurateur before entering the premises. In *Boynton* v. *Virginia,* 364 U.S. 454, this Court held that the Interstate Commerce Act forbids racial segregation of a restaurant in a bus terminal. A contention was made that there was no proof that the bus company owned or controlled the bus terminal or restaurant in it. The Court answered that "where circumstances show that the terminal and restaurant operate as an integral part of the bus carrier's transportation service for interstate passengers * * *, an interstate passenger need not inquire into documents of title or contractual arrangements in order to determine whether he has a right to be served without discrimination." *Id.* at 462–464. Thus, the Court held in *Boynton* that a Negro who is being discriminated against need not inquire into the precise facts when it appears that the discrimination violates the Interstate Commerce Act. It follows *a fortiori* that where, as in these cases, discrimination against Negroes on its face appears to violate the Fourteenth Amendment, the Negro need not ascertain the motives of the owner at the risk of suffering criminal sanctions.

If Negroes were required to ascertain the actual motives of the proprietors before seeking service at lunch counters or entering lunch rooms, their rights under the Fourteenth Amendment would be seriously abridged. These motives are frequently difficult, if not impossible, to ascertain, at the time the Negro desires service in a particular restaurant, especially when, as in most of these cases, chain stores are involved.[40] The situation is analogous to that in First Amendment cases where this Court has held that the State cannot pass statutes which, because of vagueness, or the burden of proof, or the lack of any requirement of scienter, have the indirect effect of discouraging freedom of speech even though in the particular case no protected right may have been invaded. *E.g., Smith* v. *California*, 361 U.S. 147; *Speiser* v. *Randall*, 357 U.S. 513; *Thornhill* v. *Alabama*, 310 U.S. 88; *Winters* v. *New York*, 333 U.S. 507; *Wieman* v. *Updegraff*, 344 U.S. 183. In these cases, too, the effect of the State convictions is to discourage the assertion of constitutional rights since the petitioners were not given notice of the facts necessary to determine whether their actions were constitutionally protected.

In the present cases it is unnecessary, we think, to go farther and consider whether the presumption that a State law requiring segregation in eating

[40] Negroes, it appears, are invited into these stores, and in other respects their trade is solicited on a non-discriminary basis.

places has played a significant part in the proprietor's decision can be overcome by testimony that the proprietor would have enforced segregation even if there were no current statute or ordinance. It can be argued with considerable force that a private person should not lose a power of choice which is otherwise his merely because the State or municipality has acted in an unconstitutional manner. We would submit, however, if the question had to be decided, that, whatever may be the right of a proprietor to assert in private litigation that his decision to segregate is the result of private choice rather than the State's command, the State cannot justify the prosecution as consistent with the Fourteenth Amendment upon the ground that its command directing segregation had no effective influence upon the proprietor, the police or the public prosecutor. In a criminal prosecution one cannot put the segregation statute or ordinance, the proprietor's decision and the prosecution for trespass in separate compartments. The order to segregate is too inconsistent with freedom of choice and the ways in which its existence may influence proprietors' decisions are too varied and too subtle to permit a State to defend a criminal prosecution which enforces racial segregation, upon the ground that the segregation resulted from private choice, unless the State has actually left both choices entirely open to proprietors.

The segregation ordinances are also related to petitioners' convictions for criminal trespass by another tie. The police normally exercise considerable dis-

cretion in their method of handling citizens' complaints about infractions of minor criminal laws such as the trespass statutes. Prosecutors have and exercise similar latitude in deciding whether to institute criminal proceedings; and the judge has wide discretion in his disposition of the case. A State which has current laws requiring racial segregation in public eating places interjects an official discriminatory bias into all these decisions which is certainly relevant in deciding whether a prosecution for criminal trespass is so closely related to the discriminatory ordinances as to be part and parcel of the same State denial of equal protection of the laws.

## II

**ALTHOUGH IN THE LOUISIANA CASE THE STATE ADDRESSED NO EXPLICIT STATUTORY COMMAND TO RESTAURATEURS, AS SUCH, TO SEGREGATE THEIR CUSTOMERS, IT APPEARS THAT THE STATE, BY ITS POLICIES AND BY ITS LAWS IN CLOSELY RELATED AREAS, EFFECTIVELY INDUCED THE PROPRIETOR'S ACTS OF DISCRIMINATION. SINCE THE CASE DOES NOT PERMIT A FINDING THAT THE PROPRIETOR WAS MERELY MAKING A PRIVATE DECISION UNINFLUENCED BY OFFICIAL PRESSURE, THE STATE IS CONSTITUTIONALLY FORBIDDEN TO IMPOSE CRIMINAL SANCTIONS WHICH IMPLEMENT THE DISCRIMINATION.**

A. The argument just concluded advances the proposition that when a State expresses its policy by issuing a specific statutory command to segregate it bears a heavy responsibility for discriminatory conduct which conforms to the State's requirement and cannot be permitted to compound the injustice by imposing criminal sanctions upon the victims of the

discrimination. The question presented in *Lombard* v. *Louisiana* is whether the same principle governs when the State's segregation policy is not embodied in an explicit statutory directive in terms requiring the proprietor of the particular establishment to discriminate against Negroes, but is, nonetheless, forcibly expressed and plainly evident in legislative declarations, laws in closely related areas, statements of public officials, and a long standing community-wide custom fostered and encouraged by the State.

We submit the same rule applies. For, in the absence of any contrary proof, in the latter case like the former it must be concluded that the exclusion of the Negro is the result of State policy rather than an unfettered individual decision. Notwithstanding the unsupported opinion of the Louisiana Supreme Court to the contrary (L. 146, 147, 148), an examination of the State and City policies and laws, together with the facts disclosed by the record, leads to the conclusion that Louisiana induced the acts of discrimination which support the prosecutions in *Lombard;* hence we submit these convictions are as invalid as those in the other cases.

To illustrate our point, we need go no further than the actual facts. Suppose, if you will, a State which, through its legislature, has proclaimed an overriding State policy of segregation; a State which, in pursuance of this policy, has enacted a panoply of prohibitions designed to inhibit contact between the races; a State which has vigorously and persistently enforced these prohibitions; a State which,

through the acts, conduct and statements of its public officials, has placed continuing stress upon the proposition that segregation is the required way of life; a State which, by the force of law and policy, brought to bear over the course of many decades and still continuing, has established a community-wide custom of segregation reaching virtually into every department of life. Suppose further that, though no specific enactment explicitly requires it, segregation is in fact uniformly practiced in public restaurants, in full conformity with the State's open and declared policies and with its encouragement and support. In these circumstances, does the absence of an express statutory command justify the conclusion that the State's prosecution of Negroes who seek to be served food despite the discriminatory practices followed by the proprietors of such an establishment is neutral and "color-blind"? Or, at least in the absence of a strong showing to the contrary, is one not driven, rather, to the conclusion that the State can not disclaim a measure of responsibility for the discrimination which it now seeks to implement through criminal sanctions?

Common sense requires an affirmative answer. Nor does this result call for the adoption of novel principles of law.

We begin with one certainty. The absence of an explicit statutory command does not foreclose the search for State action. The Fourteenth Amendment is not so narrowly confined. Just as the State acts in many other ways, so the Amendment looks

beyond the formal enactments of the State legislature. It notices State action in the rulings of judges, *Ex Parte Virginia,* 100 U.S. 339; *Shelley* v. *Kraemer,* 334 U.S. 1, in the edicts of governors, *Sterling* v. *Constantin,* 287 U.S. 378; *Cooper* v. *Aaron,* 358 U.S. 1; *Faubus* v. *Aaron,* 361 U.S. 197, affirming 173 F. Supp. 944, and in the decisions of all manner of subordinate local officials. *Virginia* v. *Rives,* 100 U.S. 313, 321; *Yick Wo* v. *Hopkins,* 118 U.S. 356; *Home Tel. & Tel. Co.* v. *Los Angeles,* 227 U.S. 278; *Niemotko* v. *Maryland,* 340 U.S. 268; *Pennsylvania* v. *Board of Trusts,* 353 U.S. 230; *Cooper* v. *Aaron, supra.* And, as the cases just cited make plain, discrimination by State officers is no less prohibited because it is accomplished without, or despite, the command of statutory law. See *Monroe* v. *Pape,* 365 U.S. 167, 171–172.

But the Amendment does not reach "official" acts only. The State is not insulated merely because the result is accomplished through persons interposed, however, "private" they may claim to be. The State can no more dictate discrimination in private institutions than it can segregate its own facilities. *Truax* v. *Raich,* 239 U.S. 33; *Buchanan* v. *Warley,* 245 U.S. 60; *Gayle* v. *Browder,* 352 U.S. 903, affirming 142 F. Supp. 707; *State Athletic Commission* v. *Dorsey,* 359 U.S. 533, affirming 168 F. Supp. 149; *Bailey* v. *Patterson,* 369 U.S. 31, 33; *Turner* v. *City of Memphis,* 369 U.S. 350. The constitutional right to equal treatment "can neither be nullified openly and directly by state legislators or state executive or judicial officers, nor nullified indirectly * * *" *Cooper* v. *Aaron, supra,* 358 U.S. at 17. Nor is it only when the State

explicitly dictates discrimination by others that their conduct "may fairly be said to be that of the States." *Shelly v. Kramer, supra,* 334 U.S. at 13. See *Nixon* v. *Condon,* 286 U.S. 73; *Smith* v. *Allwright,* 321 U.S. 649; *Terry* v. *Adams,* 345 U.S. 461. State "participation", "whether attempted 'ingeniously or ingenuously,'" or "insinuation" in discriminatory activity is just as real when its involvment is "nonobvious." *Cooper* v. *Aaron, supra,* 358 U.S. at 4, 17; *Burton* v. *Wilmington Parking Authority,* 365 U.S. 715, 725. Cf. *Public Utilities Comm'n* v. *Pollak,* 343 U.S. 451.[41] And, again, it does not matter through what branch of government, or whether formally or informally, the State encourages segregation by others. *Cooper* v. *Aaron, supra,* 358 U.S. at 17; *Terry* v. *Adams, supra,* 345 U.S. at 475 (opinion of Mr. Justice Frankfurter); *Barrows* v. *Jackson,* 346 U.S. 249, 254. As stated by this Court many years ago, "the prohibitions of the Fourteenth Amendment * * * have reference to actions of the political body denominated a State, by whatever instruments or in whatever modes

[41] See, also, *Muir* v. *Louisville Park Theatrical Association,* 347 U.S. 971, reversing and remanding 202 F. 2d 275; *Kerr* v. *Enoch Pratt Free Library of Baltimore City,* 149 F. 2d 212 (C.A. 4); *Department of Conservation & Development* v. *Tate,* 231 F. 2d 615 (C.A. 4); *City of St. Petersburg* v. *Alsup,* 238 F. 2d 830 (C.A. 5); *Derrington* v. *Plummer,* 240 F. 2d 922 (C.A. 5); *City of Greensboro* v. *Simkins,* 246 F. 2d 425 (C.A. 4); *Baldwin* v. *Morgan,* 287 F. 2d 750 (C.A. 5); *Lawrence* v. *Hancock,* 76 F. Supp. 1004 (S.D.W.Va.); *Jones* v. *Marva Theatres, Inc.,* 180 F. Supp. 49 (D.Md.); *Coke* v. *City of Atlanta, Ga.,* 184 F. Supp. 579 (N.D.Ga.). And see *Valle* v. *Stengel,* 176 F. 2d 697 (C.A. 3).

that action may be taken." *Ex Parte Virginia, supra,* 100 U.S. at 346–347.

The cases just cited, although they do not resolve the present issue, show the breadth of the concept of State action, which, as Mr. Justice Clark pointed out in *Burton* v. *Wilmington Parking Authority,* 365 U.S. 715, 721–722, has from the day of the *Civil Rights* cases until *Cooper* v. *Aaron* embraced "State action of every kind * * * which denies * * * the equal protection of the laws" (109 U.S. at 11) and also "state participation through any arrangement, management, funds or property" (358 U.S. at 4). So long as the State has meaningfully "place[d] its authority behind discriminatory treatment based solely on color [it] is indubitably a denial by a State of the equal protection of the laws, in violation of the Fourteenth Amendment." *Burton* v. *Wilmington Parking Authority, supra,* 365 U.S. at 727 (dissenting opinion of Mr. Justice Frankfurter).

In short, the State is not insulated from responsibility under the Fourteenth Amendment merely because a private person commits the final act of invidious discrimination. The question, as Mr. Justice Clark has pointed out for the Court, is whether the State in any of its manifestations has, to some significant extent, become involved in the discrimination. *Burton* v. *Wilmington Parking Authority,* 365 U.S. 715, 722.

B. In light of these principles, we consider whether the act of discrimination which lies at the base of the prosecution of the petitioners in *Lombard* can be said to be "private", rather than State-induced.

1. The segregationist policy of Louisiana is reflected in its laws. The scheme is not haphazard. Almost every activity is segregated. Discrimination against the Negro literally begins with his birth and continues to his death, and beyond.

At the outset, the Negro is given a birth certificate which so identifies him. La. R.S. 40:244. He starts life on a segregated street. La. 33:5066–5068. See also, La. R.S. 33:4771. As a child he is segregated in parks, playgrounds, swimming pools, and other recreational activities. La. R.S. 33:4558.1. If taken to the circus, he must go in by a separate entrance. La. R.S. 4:5. Until very recently, he was relegated to all-Negro public schools. Former La. R.S. 17:331–334, 17:341–344 (repealed in 1960).[42] Even now, he may attend a segregated school in the upper grades. See *Orleans Parish School Board* v. *Bush*, August 6, 1962 (C.A. 5). Later on, he will be compelled to stay apart at all entertainments and athletic contests. La. R.S. 4:452. Mixed social functions are absolutely banned. La. R.S. 4:451. At work, he will eat separately and use separate sanitary facilities. La. R.S. 23:971–975. His voting registration is separately tabulated. La. R.S. 18:195. And, should he become a candidate for elective office, he will be identified by race on the ballot. La. R.S. 18:1174.1. He may not marry outside

[42] Despite the contrary rulings of the federal courts the statute books of Louisiana are not yet wiped clean of provisions designed to forestall effective desegregation of the public schools. See, *e.g.*, La. R.S. 17:107, 17:394.1, 17:395.1–4, 17:2801, *et seq.*, 17:2901, *et seq.*

of his race. La. Civil Code, Art. 94; La. R.S. 9:201. See, also, La. R.S. 14:79. If he is divorced, the court proceedings will reflect his color. La. R.S. 13.917, 13:1219.

Institutions for the blind and deaf are segregated. La. R.S. 17:10–12. So are homes for the aged and infirm. La. R.S. 46:181. And prisons also separate the races. La. R.S. 15:752, 15:854. See, also, La. R.S. 15:1011, 15:1031.

Finally, his death will be attested by a certificate identifying him by race. La. R.S. 40:246. And he will be buried, presumably in a segregated cemetery,[43] perhaps under a funeral policy which has been separately administered. La. R.S. 22:337, 22:345.

Significantly, in this pervasive scheme of segregation, there seems to be special emphasis on separate consumption of food and drink. Employers are required to segregate their employees during meals, even to the point of supplying different utensils for each race. La. R.S. 23:972. Likewise, at all places of public entertainment, separate water fountains must be provided. La. R.S. 4:452. And, in New Orleans at least, strict segregation is required in all establishments which serve beverages with more than one-half of 1 percent alcohol. New Orleans City Code, §§ 5–2(1), 5–61.1. All appearances suggest that the leg-

[43] While there appears to be no specific statute segregating cemeteries, the practice seems to be required, at least in all publicly owned cemeteries, by the recent constitutional provision compelling segregation in all State, parochial or municipal institutions. See La. Const. 1921, Art. X, § 5.1, as added by Act 630 of 1960, adopted November 8, 1960.

islative policy of Louisiana includes segregation of public restaurants and lunch counters.

The statute books give no false impression. While compulsory segregation is far from new in Louisiana, neither are the present laws mere vestiges of a forgotten past. Many of the statutes are recent. None are ignored as obsolete. On the contrary, what remained of a more generous era (see *Hall* v. *DeCuir*, 95 U.S. 485) was quickly erased from the books. One relevant example is the repeal in 1954, shortly after this Court's initial decision in *Brown* v. *Board of Education*, 347 U.S. 483, of the local "inkeeper" statute and a companion provision specifically banning "distinction or discrimination on account of race or color" in licensed "places of public resort." See former La. R.S. 4:3–4, repealed by Act 194 of 1954.

Where the State's segregation policy has given away, it has been almost invariably under the compulsion of federal court orders, and then only after most protracted litigation. See *Wilson* v. *Board of Supervisors*, 92 F. Supp. 986 (E.D. La.), affirmed, 340 U.S. 909 (State law school); *Tureaud* v. *Board of Supervisors*, 116 F. Supp. 248 (E.D. La.), reversed, 207 F. 2d 807, judgment of court of appeals stayed, 346 U.S. 881, vacated and remanded, 347 U.S. 971, affirmed, 225 F. 2d 434, reversed and remanded on rehearing, 226 F. 2d 714, affirmed on further rehearing *en banc*, 228 F. 2d 895, certiorari denied, 351 U.S. 924 (State undergraduate and law school); *Morrison* v. *Davis*, 252 F. 2d 102 (C.A. 5), certiorari

denied, 356 U.S. 968, rehearing denied, 357 U.S. 944 (Buses and streetcars); *New Orleans City Park Improvement Ass'n* v. *Detiege,* 252 F. 2d 122 (C.A. 5), affirmed, 358 U.S. 54 (Municipal park); *Ludley* v. *Board of Supervisors of L.S.U.,* 150 F. Supp. 900 (E.D. La.), affirmed, 252 F. 2d 372, certiorari denied, 358 U.S. 819 (State colleges); *Dorsey* v. *State Athletic Commission,* 168 F. Supp. 149 (E.D. La.), affirmed, 359 U.S. 533 (Interracial sports contests); *Board of Supervisors of Louisiana State U.* v. *Fleming,* 265 F. 2d 736 (C.A. 5); (State university); *Louisiana State Board of Education* v. *Allen,* 287 F. 2d 32 (C.A. 5), certiorari denied, 368 U.S. 830 (State trade school); *St. Helena Parish School Board v. Hall,* 287 F. 2d 376 (C.A. 5), certiorari denied, 368 U.S. 830, further relief granted, 197 F. Supp. 649, affirmed, 368 U.S. 515 (Public schools); *East Baton Rouge Parish School Board* v. *Davis,* 287 F. 2d 380 (C.A. 5), certiorari denied, 368 U.S. 831 (Public schools). This Court is, of course, familiar with the course of the litigation involving the public schools of New Orleans. See *Bush* v. *Orleans Parish School Board,* 138 F. Supp. 337 (E.D. La.), leave to file mandamus denied, 351 U.S. 948, affirmed, 242 F. 2d 156, certiorari denied, 354 U.S. 921, denial of motion to vacate affirmed, 252 F. 2d 253, certiorari denied, 356 U.S. 969, further motion to vacate denied, 163 F. Supp. 701, affirmed, 268 F. 2d 78; *id.,* 187 F. Supp. 42, stay denied, 364 U.S. 803, affirmed, 365 U.S. 569; *id.,* 188 F. Supp. 916, stay denied, 364 U.S. 500, affirmed, 365 U.S. 569; *id.,* 190 F. Supp. 861, affirmed,

366 U.S. 212; *id.*, 191 F. Supp. 871, affirmed, 367 U.S. 908; *id.*, 194 F. Supp. 182, affirmed, 367 U.S. 907, 368 U.S. 11; *id.*, 204 F. Supp., 568, modified, 205 F. Supp. 893, modified and affirmed (C.A. 5), August 6, 1962.

As the State Legislature recently proclaimed, not only has Louisiana "always maintained a policy of segregation of the races," but "it is the intention of the citizens of this sovereign state that such a policy be continued." La. Act 630 of 1960, Preamble.

2. The statute books tell only a part of the story. Louisiana has a long tradition of racial discrimination, as is attested by the cases which have reached this Court. See, in addition to the cases already cited and those cited, *infra*, p. 70, *United States* v. *Cruikshank*, 92 U.S. 542; *Plessy* v. *Ferguson*, 163 U.S. 537; *Harmon* v. *Tyler*, 273 U.S. 668;[*] *Pierre* v. *Louisiana*, 306 U.S. 354; *Louisiana* v. *N.A.A.C.P.*, 366 U.S. 293. Even in areas where there is no specific statute, the custom of segregation persists. And, of course, customs often have a force akin to law. *Civil Rights Cases*, 109 U.S. 3, 16, 21; *Terry* v. *Adams*,

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[*] Louisiana's reluctance to abandon its tradition of segregation, even where this Court has ruled, is exemplified by the retention of the provision banning mixed communities in the 1950 codification of the laws still in effect, long after this Court's declaration that the statute was unconstitutional in *Harmon* v. *Tyler*. The Reporter for the revision notes that, since "[t]he state supreme court in its opinion [upholding the statute] had carefully distinguished or attempted to distinguish, the *Buchanan* case [*Buchanan* v. *Warley*, 245 U.S. 60, relied on by this Court]," and since this Court's ruling was "only a memorandum decision," the provision should be retained as still in force. See "Reporter's Notes" to La. R.S. 33:5066.

*supra*, 345 U.S. at 475 (opinion of Mr. Justice Frankfurter). Indeed, the Louisiana criminal courts are expressly enjoined to take judicial notice of extra-legal racial customs, presumably because they have legal relevance. See La. R.S. 15:422(6).

Specifically, a strict practice of segregation prevails in the service of food. As Mr. Justice Douglas noted in *Garner* v. *Louisiana*, 368 U.S. 157, 181 (concurring opinion):

> Though there may have been no state law or municipal ordinance that *in terms* required segregation of the races in restaurants, it is plain that the proprietors in the instant cases were segregating blacks from whites pursuant to Louisiana's custom. Segregation is basic to the structure of Louisiana as a community; the custom that maintains it is at least as powerful as any law. * * *

The custom had not changed when the present "sit-in" occurred. Both the Mayor and Police Superintendent of New Orleans frankly stated that they knew of no desegregated restaurant in the City.[45]

But segregation in restaurants is no mere *private* custom. If it were, it would doubtless have long since ceased to be the uniform practice. See *Cooper* v.

[45] We understand that since the granting of the petition in *Lombard* several department stores in New Orleans have desegregated their lunch counters. Of course, the partial desegregation of eating establishments at the present time does not disclose the situation when the discrimination at the base of these prosecutions occurred, two years earlier.

*Aaron, supra,* 358 U.S. at 20–21, 25, 26 (concurring opinion of Mr. Justice Frankfurter). It is actively supported by the outspoken policies of the State—policies so hardened that State employees are enjoined from advocating integration under penalty of losing their jobs. See La. R.S. 17:443, 17:462, 17:493, 17:523.

The State itself, apart from the enactment of compulsory legislation, sets the example. It segregates all of its own facilities. La. Const. 1921, Art. X, as amended 1960, § 5.1. It continues to discriminate in the electoral process. See *United States* v. *McElveen,* 180 F. Supp. 10 (E.D. La.), affirmed *sub nom. United States* v. *Thomas,* 362 U.S. 58; *United States* v. *Association of Citizens Councils of Louisiana,* 196 F. Supp. 908 (W.D. La.); *United States* v. *Manning,* 205 F. Supp. 172 (W.D. La.). See, also, *Hannah* v. *Larche,* 363 U.S. 420. Despite decisions in this Court, beginning with *Strauder* v. *West Virginia,* 100 U.S. 303, discrimination in grand jury selection persisted in New Orleans until at least 1954. See *Eubanks* v. *Louisiana,* 356 U.S. 584, 586. See, also, *Poret* v. *Sigler,* 361 U.S. 375. And efforts by Negroes to challenge segregation customs have been promptly met with prosecutions for breach of the peace. *Garner* v. *Louisiana,* 368 U.S. 157 (lunch counter customarily reserved for whites); *Taylor* v. *Louisiana,* 370 U.S. 154 (terminal waiting room customarily reserved for whites).

3. As indicated above, the inference that the State government causes and sustains the practice of segre-

gation in Louisiana restaurants seems unavoidable. In this instance, there were additional pressures by local officials.

Although the former New Orleans Mayor and the Superintendent of Police are men of moderation, whose utterances were restrained, their statements, quoted in full at pp. 12–15, *supra*, could not but harden the opposition to desegregation of lunch counters in the City. The timing of these official declarations was crucial.

It appears that, one week prior to the "sit-ins" here involved, the Superintendent of Police issued a public statement (*supra*, pp. 12–13), reprinted in the city's leading newspaper, which, in the context of Louisiana's laws and customs, must have been understood to condemn the efforts of the city's Negro citizens to achieve equality of treatment at lunch counter facilities not only by demonstrations but by any means. Terming the first "sit-ins" to have occurred in New Orleans "regrettable," the Superintendent claimed they were instigated by a "very small group" which did "not reflect the sentiments of the great majority of responsible citizens, both white and Negro, who make up our population." The Superintendent appealed to "mature responsible citizens of both races" to "exercise * * * sound, individual judgment, goodwill and a sense of personal and community responsibility." Parents of the demonstrators were asked "to urge upon these young people that such actions are not in the community interest." Perhaps most significant, the Superintend-

ent saw "no reason for any change whatever in the normal, good race-relations that have traditionally existed in New Orleans." In the existing environment this exhortation can hardly have been understood to be confined to illegal demonstrations; it obviously supported the notion that proprietors should continue to refuse service to Negroes, for the normal traditional pattern of race relations with respect to food service, as the Mayor and Superintendent testified, was that proprietors would not serve Negroes on an integrated basis.

Four days prior to the "sit-ins," the Superintendent's statement was buttressed by a statement issued by the Mayor (*supra*, pp. 13–15) also published in the press. The Mayor declared that he had "directed the superintendent of police that no additional sit-in demonstrations or so-called peaceful picketing outside retail stores by sit-in demonstrators or their sympathizers will be permitted." This command was not restricted to demonstrations involving refusals to leave after being requested to do so. It acknowledged no room for free private decisions by the owners of lunch counters, no opportunity for Negroes to seek service in the hope that the owners would abandon segregation. It was also a direct prohibition upon lawful peaceful picketing (Cf. *Thornhill* v. *Alabama*, 310 U.S. 88) designed to encourage proprietors to serve Negroes on an integrated basis. The Mayor stated that he would enforce his directions by invoking two recent enactments of the State legislature prohibiting acts which could "foreseeably disturb or alarm the

public." Finally, he demanded that "such demonstrations cease" in the "community interest."

The foregoing statements read in isolation might fairly be construed to deal only with "sit-in" demonstrations. However, their combined effect in the Louisiana context, we submit, was not only to discourage "sit-ins" but to condemn the goal of equality of service and any activity intended to persuade the proprietors of public eating-places to cease segregation. Their impact upon those who might otherwise have acceded to the demands for equality of treatment seems plain.

4. We return to the question whether the total body of State influences—the manifold current segregation laws and contemporaneous declarations of policy, the customs stemming therefrom and the declarations of the mayor and chief of police—should be found to have played the same decisive role in the proprietors' discrimination against petitioners Lombard *et al.* as the municipal ordinances were seen to play in the companion cases previously discussed. See pp. 50–59 *supra*. The situations differ in that the Louisiana laws did not literally require the segregation. They are the same in that on this record one can only conclude that Louisiana's official actions must have been effective inducing causes of the proprietor's choice. Under these circumstances, too, normal human experience teaches that the individual proprietor would never face the problem of forming a judgment uninfluenced by State policy. The State which enacts unconstitutionally discriminatory laws in areas so

closely related to segregation in public eating-places and which declares generally that racial segregation is the policy of the State has the same burden of disentangling its influence upon the proprietors' discrimination from other factors for which the State is not responsible. And there is the same burden to show petitioners' awareness that the segregation was the result of the proprietor's individual choice uninfluenced by State action, if indeed that were the truth.

In the present case, we are not left merely to inference and presumption. Far from overcoming the conclusion that the exclusionary practice stemmed from the State, the testimony of the store manager confirmed it. Although his testimony on this subject was curtailed at the trial (see *supra*, pp. 17–19), the manager pointedly declared (*supra*, pp. 16–17) that he refused petitioners service because of "local tradition, law and custom."

Louisiana's official segregation policies are also related to petitioners' convictions for criminal trespass by their inevitable effect upon the police, the prosecutors and the State courts. Louisiana's policy, like the segregation-in-public-eating-places ordinances discussed at pages 49–59 *supra*, interjected an official discriminatory bias into the decisions of the police in the handling of complaints, into the decision of the prosecutor as to whether to institute criminal proceedings and, quite possibly, into the sentence. This impact of the segregation policies in the criminal proceeding confirms our conclusion that the convictions violate

the Fourteenth Amendment because on these records they are inseparably part of the official State policy of denying Negroes equal protection of the laws.

In the present case, it is unnecessary to consider just how large a body of State laws would justify finding, in the absence of contrary proof, that the State is so involved in the proprietor's decision that it is barred from initiating a prosecution for criminal trespass. Each particular case must be individually decided by making a judgment upon the question of degree, and the smaller the body of State law the closer the case will fall to the dividing line. In the *Lombard* case the Louisiana statutes are current and the general State policy of segregation was declared by the legislature as recently as 1960. The problem that would arise if the statutes had been repealed and the private discrimination were only the result of community customs promoted by earlier State laws does not require consideration here. The currency and pervasiveness of the body of Louisiana's segregation laws and the plainness with which that policy is declared show that this case is well on the unconstitutional side of the dividing line.

5. We have argued above that the record utterly fails to overcome the strong inference that the proprietor's acts of discrimination were brought about by the State. Although the Louisiana Supreme Court has stated in its opinion (L. 147) that the decision to exclude Negroes was independently made by the store owner, we find no supporting evidence for this conclusion. The manager did testify that, so far as the

national chain was concerned, the determination was left to him. And, obviously, it was he who actually established the segregated eating accommodations and maintained them separate. But the courts below gloss over the manager's explanation why he acted as he did. So far as he was permitted to explain, he said he was following prevailing "local tradition, law and custom," as he interpreted it. Further cross-examination on this point was cut off. Clearly, this statement does not support the conclusion that he made a purely private decision.

We think this evidence unambiguous against the background already sketched. For, as we have said, having intruded so actively and so pervasively in the area of race relations, the State had to overcome the presumption that it participated in the act of discrimination at the base of these prosecutions. And, certainly, Louisiana has not met that burden, at the trial or elsewhere. But the result here would not be different if the Court should disagree and hold that the shoe was on the other foot. For, if petitioners bore the burden of proving the State's involvement, they were at least entitled to an opportunity to make that showing. And, if they have failed to satisfy this Court, it is only because their efforts in this direction were summarily cut short.

As the court below confirms, petitioners "sought to introduce evidence to establish that the action of the manager of McCrory's was provoked or encouraged by the state, its policy, or officers * * *" (L. 146). But the trial court refused that evidence. To cite one example, during the questioning of the store manager,

petitioners' counsel asked: "Will you tell the court why you were not allowed to serve them?" (L. 109). After an objection by the prosecutor was sustained on the ground that the question was not material, defense counsel stated the purpose of his inquiry (L. 110):

> I think it is material, because if Mr. Graves [the restaurant manager] felt there was some State policy that prevented him from serving these defendants this is a clear state action. * * *

Nor is this an isolated instance. Consistently, during the preliminary hearing on the motion to quash and during the trial itself, the trial judge prevented inquiry as to why the restaurant discriminated (L. 23, 25, 26, 107, 108, 127–128). The court having imposed upon them the burden of proving the State's involvement, this curtailment of petitioners' attempt to show that the store's decision to discriminate was attributable to the State was clearly improper. It follows that the *Lombard* convictions would have to be reversed even if the burden of showing whether the State's active support of segregation actually influenced the proprietor was upon the petitioners rather than the State.

## III

### THE DECISION IN THESE CASES SHOULD NOT BE DETERMINED BY CONSIDERATIONS PERTINENT SOLELY TO RIGHTS AS BETWEEN THE PROPRIETORS AND PETITIONERS

We have considered thus far the issues as between the petitioners and the States, and have shown that upon these records it must be concluded that the

States were sufficiently responsible for the discrimination to make their total action in relation to the petitioners' sentences—the inducement to discriminate plus the prosecution, conviction and sentences—a denial of equal protection of the law. In other words, a State may not, consistently with the Fourteenth Amendment, both induce a proprietor to engage in racial discrimination and prosecute the victims for criminal trespass or a similar offense.

The question may be raised, what are the mutual rights and duties of the petitioners and proprietors in the context of an ordinance requiring, or State action strongly encouraging, racial segregation. It may be argued, in attack upon our position, that reversal upon the grounds we urge would require holding the proprietors to a duty to serve Negroes and denying them private right to exclude them for whatever personal reasons they chose, a result inconsistent with the preservation of the private freedom of choice, sustained in the *Civil Rights Cases* and our ensuing constitutional history. The Negroes' remedy, the argument would conclude, is by direct attack upon the unconstitutional ordinances and official segregation policies rather than the proprietors' private freedom to discriminate.

We believe that this line of inquiry need not be fully explored because a decision in the present cases upon the ground put forward in this brief need not determine the private rights as between proprietors of public eating places and Negroes seeking service.

In the first place, there is no need to decide here whether even a criminal prosecution would violate the Fourteenth Amendment if it were made to appear as a fact that the proprietor's discriminatory practice was not a result of State action but of a personal wish to discriminate which would have been indulged in the absence of the State laws. On the records before the Court, this is not the fact. Obviously, the decision, then, cannot affect rights in private litigation in which the fact is made to appear.

Second, the presumption that the State law has influenced the private decision—a presumption which operates against the State in a criminal prosecution—might not operate in the same fashion against the private owner. The State, having adopted unconstitutional segregation laws, has a duty to disentangle the consequences; it does not lie in the State's mouth, at least in the absence of clear proof, to say that the very discriminatory practices that it ordered or otherwise sought to induce were actually unrelated to the State's directions or encouragement. This reasoning, however, would not run against the individual proprietor and consequently, as between him and the Negro, the outcome of any litigation might be different.

Third, we submit that there is no reason, in the circumstances of these cases, why the ability of the State to prosecute must be exactly the same, both substantively and procedurally, as the right of private owners to refuse service and exclude the Negro who

insists upon service. It is one thing to say that a State which enacts a law requiring segregation in public eating places is guilty of denying Negroes equal protection of the laws not only when it enforces that statute against them, but also when it prosecutes them for criminal trespass because of the decision of those who are apparently obeying the statutory command. That conclusion follows because the segregation laws cannot be so rigidly separated from the criminal prosecution; the prosecution, at least until the contrary is clearly demonstrated, is not only State action but a consequence, and therefore part and parcel, of the concurrent denial of equal protection of the laws. It is quite a different thing, however, to deprive the owner of any property rights which he may independently wish to exercise, on the ground that the State has violated the Fourteenth Amendment. Because of this difference the disposition of these criminal cases need not affect the private rights of proprietors and those seeking restaurant service, and those rights would remain to be determined whenever the issue may arise.

Under the facts of these cases, there is no serious incongruity in suggesting that the proprietors have not necessarily lost their right of action or defense in private suits merely because the State is constitutionally barred from implementing their discrimination through the imposition of criminal sanctions. The problem, if any, is confined within a narrow compass, and it is curable. We espouse no broad

rule of constitutional law which would, in all cases, deny the storeowner who wished to discriminate among customers the aid of the State criminal law. That might be the result if it were held that a State violates the Fourteenth Amendment merely by arresting and prosecuting those who trespass upon segregated premises. But we present no such question. Our contention is that, in cases like those at bar, the arrests and prosecutions violate the Constitution because the State itself has been a party to the underlying discrimination. To regain its neutrality and remove the only barrier now urged against its action, it suffices if the State terminates its objectionable inducement of discriminatory practices.

In summary, we submit that when the State, by its current laws, actions, and policies, brings about individual acts of discrimination in the conduct of a business open to the public at large, it cannot impose criminal sanctions upon those who have been excluded, on the theory that it is merely implementing a private property right. Americans, both black and white, may stand upon a more fundamental right: The right that government shall deny to no man the equal protection of the laws.

## CONCLUSION

For the foregoing reasons, the judgments of conviction in these cases should be reversed.

Respectfully submitted.

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IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1962.

No. 67.

F. L. SHUTTLESWORTH and CHARLES BILLUPS,
Petitioners,

vs.

CITY OF BIRMINGHAM,
Respondent.

## BRIEF FOR RESPONDENT.

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vs.

CITY OF BIRMINGHAM,
Respondent.

## BRIEF FOR RESPONDENT.

### STATEMENT IN OPPOSITION TO CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

Petitioners, for the **first time since their arrest,** now contend before this Court that an alleged Section 369 of the General Code of the City of Birmingham of 1944 is involved in the instant controversy (p. 2). This section purportedly requires restaurant operators to provide separate facilities for members of the white and colored races (ibid.).

Since Petitioners made no issue of any such ordinance in the state courts, your Respondent respectfully submits that any such ordinance is not an appropriate subject for controversy in this proceeding.

Respondent further urges that Section 1 of the Fourteenth Amendment to the Constitution of the United States (p. 2) is in no way involved in this proceeding, since neither the **aiding and abetting** ordinance (Section 824), nor the **trespass after warning** ordinance (Section 1436), involve or are in any way predicated upon racial or other considerations finding protection in the Fourteenth Amendment.

## STATEMENT IN OPPOSITION TO QUESTION PRESENTED FOR REVIEW.

Petitioners present a single question for the review of this Court (p. 3).

The question is predicated upon the supposition that "Alabama has convicted petitioners" of inciting or aiding or abetting another to go or remain on the premises of another after being warned not to do so.

Petitioners then propose for review by the Court the question of whether, in convicting and sentencing the petitioners, "has Alabama denied liberty, including free speech, secured by the due process clause of the Fourteenth Amendment?"

The State of Alabama is not a named party in the case, and so far as the City of Birmingham, the respondent named in this cause, is aware, no effort has been exerted at any time to make the State of Alabama a party. Since "Alabama" was not a party to the case below, and is not a named party before this Court, the sole question presented here for review seems entirely and completey **moot**.

Petitioners take occasion to also predicate their question presented for review (p. 3) upon the hypothesis that "a Birmingham ordinance requires racial segregation in restaurants".

The petitioners' reference to such an alleged ordinance is made here before this Court for the **very first time** since the arrest of the petitioners and is not an appropriate matter to be considered by this Court. To otherwise rule would deprive the state courts of an opportunity to pass upon the validity or non-validity of local laws and thereby circumvent the entire state appellate procedures.

## ARGUMENT.

### I.

### Statutory Provisions Involved.

It is contended by petitioners that "Section 369 (1944)" of the respondent's city code is involved in the case now before the Court.

The alleged ordinance requires a restaurant operator to maintain certain partitions and entrances for white and colored persons in eating establishments (pp. 2, 10).

Assuming such to be true, the propriety of suggesting the ordinance for the **first time** in this Court is completely out of harmony with past decisions of this Court. In the case of **Local No. 8-6, Oil, Chemical and Atomic Workers International Union, AFL-CIO, v. Missouri**, 80 S. Ct. 391, 361 U. S. 363, 4 L. Ed. 2d 373, this Court said, "Constitutional questions will not be dealt with abstractly. * * * They will be dealt with only as they are appropriately raised upon a record before us. * * * Nor will we assume in advance that a State will so construe its law as to bring it into conflict with the federal Constitution or an act of Congress." The foregoing quote was adopted from the earlier decision of this Court in **Allen-Bradley Local, etc., v. Wisconsin Employment Relations Board**, 315 U. S. 740, at page 746, 62 S. Ct. 820, at page 824, 86 L. Ed. 1154.

The records before this Court clearly show that petitioners have never placed before the **state courts** the matter of any such ordinance requiring separation of the races, although lengthy and detailed pleadings were interspersed throughout all of the student sit-down cases (**Gober et al.**, now here in No. 66), as well as the instant case.

Petitioners argue that an Alabama statute requires that ordinances of the City of Birmingham be judicially recognized (p. 9—Footnote 5). Respondent agrees that its ordinances are judicially noticeable, but only in appropriate instances.

Bearing in mind that **judicial notice is a rule of evidence** rather than a **rule of pleading, Gulf, M. & N. R. Co. v. Weldy**, 8 So. 2d 249, 193 Miss. 59, 144 A. L. R. 930, the suggested ordinance, to have served some defensive purpose (see **Code of Alabama (1940), Title 7, Section 225**), would of necessity have had to be incorporated into a plea or answer to the complaint. If then, after the supposed ordinance was properly made an issue in the trial below, petitioners sought judicial notice by the Court, rules of **evidence** making it unnecessary to prove by evidence the existence of such an ordinance would have been entirely applicable. The record before the Court clearly demonstrates, of course, that petitioners did not place the question of such ordinance before the lower court, nor was any **assignment of error** directed to the proposition before the state appellate court (R. 41, 42).

This question is not a new one for this Court. In the recent case of **Garner v. State of Louisiana**, 82 S. Ct. 248 (1961), Mr. Chief Justice Warren, in delivering this Court's opinion, stated, "There is nothing in the records to indicate that the trial judge did in fact take judicial notice of anything. To extend the doctrine of judicial notice to the length pressed by respondent * * * would be 'to turn the doctrine into a pretext for dispensing with a trial' ", citing **Ohio Bell Telephone Co. v. Public Utilities Commission**, 301 U. S. 292, 302, 57 S. Ct. 724, 729, 81 L. Ed. 1093. The foregoing opinion further recited the inherent danger of a court taking upon itself the prerogative of unsolicited judicial notice in the absence of inserting same into the record by saying a party, "* * * is de-

prived of an opportunity to challenge the deductions drawn from such notice or to dispute the notoriety or truth of the facts allegedly relied upon."

In light of the **Garner opinion**, supra, and in light of the fact that the record discloses nowhere that the court below, either upon solicitation of counsel or otherwise, took or refused to take judicial notice of any such ordinance, and further, that no assignment of error before the state appellate court made any reference whatever to the existence of such an ordinance, thereby affording the state appellate court an opportunity to rule on any question relating to the validity of the ordinance, your respondent respectfully urges that no constitutional or other questions dependent upon such an ordinance are properly before this Court for review. To rule otherwise would completely dispense with the need for filing pleadings since the Court would be required, under petitioners' theory, to at all times be alert to every ordinance of the City of Birmingham and to place them in issue whenever same might be applicable, thereby placing the burden upon the Court to, in effect, act as counsel for the person in whose favor the ordinance might operate.

## II.

## Fourteenth Amendment Does Not Require Reversal of Petitioners' Conviction.

### A. There is evidence in the record upon which petitioners' conviction may be affirmed.

Petitioners argue that "there is no evidence in the record on which these convictions may be affirmed" (p. 7).

An examination of the record reveals that on the evening of March 30, 1960 James Gober (one of the participants in the sit-downs) went to Rev. Shuttlesworth's house

(R. 23, 27, 28); there were several people present (R. 28); Rev. Shuttlesworth and Rev. Billups were there (ibid); the meeting was in the living room of Rev. Shuttlesworth's house (ibid); Rev. Shuttlesworth participated in the discussion about the sit-downs (ibid); Rev. Shuttlesworth asked for volunteers to participate in the sit-downs (ibid); someone in the meeting made up a list (R. 30); Rev. Billups came to his (James Albert Davis, a participant in the sit-down demonstrations) school in a car and carried him to Rev. Shuttlesworth's house (R. 31); in response to Rev. Shuttlesworth asking for volunteers to participate in the sit-downs, James Albert Davis volunteered to go to Pizitz at 10:30 and take part in the sit-downs (ibid); that Rev. Shuttlesworth made the announcement that he would get them out of jail (R. 31, 32); that James Gober, James Albert Davis, and other boys attending the meeting at Rev. Shuttlesworth's house participated in sit-downs in downtown stores on March 31, 1960 (R. 33).

The foregoing facts and events are substantially as stated in petitioners' brief. There being no dispute as to the facts, the crux of the matter resolves itself around the question of whether these facts constituted "any evidence" upon which the state court could conclude that Rev. Shuttlesworth or Rev. Billups had in any manner incited, aided or abetted another to go upon the premises of Pizitz Department Store, or any other store, and remain thereon "after being warned not to do so"; or, as stated by petitioners in brief, is the record "barren of any evidence" of such fact, as in **Thompson v. City of Louisville**, 362 U. S. 199.

To answer this question, may we direct the Court's attention to available facts as shown by the record and as admitted by petitioners. Petitioners have informed this Court that the current wave of sit-downs is nothing new (p. 9). (The complaints in the instant cases were filed

October 11, 1960.) Petitioners asserted in the state courts that sit-downs are "well recognized symbols" (see Petition for Certiorari in **Gober et al.**, a companion case, now before the Court in No. 66, p. 17, 1st paragraph). Petitioners assert and quote authority for the proposition that sit-downs "are by their inherent and manifest nature a protest against racial discrimination" (p. 10).

Petitioners inform us that the participants in the sit-downs were at all times peaceful (pp. 10, 11); that under the alleged Section 369 of the respondent's City Code restaurant operators were required to furnish certain partitions and separate entrances for white and colored races (p. 2). The record shows that Rev. Shuttlesworth asked "for volunteers to participate in the sit-down strikes" (R. 31); Davis "volunteered to go to Pizitz (department store) at 10:30 and take part in the sit-down demonstrations"; that Rev. Shuttlesworth "participated in the discussion about the sit-down demonstrations" (R. 28) and announced "he would get them out of jail" (R. 31, 32).

Admittedly, the participants were peaceful. Certainly they were not to be arrested for breaching the peace. The operators of the eating establishments, **not the customers**, were punishable under the alleged ordinance pertinent to restaurants. Certainly the state court should not have assumed that the customer was to be arrested for the operators' shortcomings, if any, under some newly alleged ordinance which was never injected into the case from the time of the arrest of the petitioners until after the case had left the state courts; especially is this true in the absence of any showing by petitioners that the eating establishments failed to comply with such ordinance by failure to provide partitions, etc. The obvious arrest contemplated was the arrest which would ensue when the participants in the sit-downs refused to leave when requested to do so. While respondent submits there is no

other conceivable interpretation to be placed upon the assurance of getting the participants out of jail, if the state court had **any reason whatever** to assume from the evidence this to be true, then the rule of the **Thompson case**, supra, has been overcome.

But going further, it must be remembered that sit-downs were an established fact of life when petitioners were tried in the state court. Petitioners tell us they predated by far the instant trials (p. 9), which, of course, is a commonly known fact. Petitioners say **"sit-downs"** are a "well recognized symbol"; that by good authority **"sit-downs"** are known to have "inherent and manifest" characterizations. At Rev. Shuttlesworth's meeting, **"sit-downs"** were discussed (R. 28); volunteers were solicited to participate in **"sit-down demonstrations"** (ibid); one Davis volunteered to take part in the **"sit-down demonstrations"** (R. 31).

From every indication, everyone at Rev. Shuttlesworth's meeting knew what a **"sit-down"** was. Legal periodicals are presumed to know what a **"sit-down"** is; **"sit-downs"** had "well recognized" attributes. National and local publications had sensationalized them with detailed accounts. Not once in the trial court did counsel for petitioners offer any objection to use of the term "sit-down" as being vague or undefinable. Neither they nor any of the witnesses were mystified by the use of the term but appeared to the contrary to be quite familiar with it. Everyone is apparently presumed to know what a "sit-down" is except the Alabama courts, when they say a sit-down is "a form of trespass after warning" and "denotes a violation of both State law, and especially of Section 1436 of the City Code, supra" (R. 43, 44).

Bearing in mind that the petitioners were tried in the absence of a jury at their own behest, the trial court had

every latitude granted by law to jurors. The court had not only the authority, but a duty imposed by law to draw all reasonable inferences from the facts in evidence, in the light of common knowledge, common sense and human experience in arriving at its verdict. **Southern Coal & Coke Co. v. Swinney**, 149 Ala. 405, 42 So. 808; **Hancock v. Kelly**, 81 Ala. 368, 2 So. 281. Certainly no rational jury would have assumed after Rev. Shuttlesworth's discussion of the sit-downs and his promise to get the participants out of jail, that they were simply to walk to the eating counters, ask to be served, and leave the premises when requested to do so. The state court would have been remiss had it not concluded from the promise to free the participants in the sit-downs that they were to be defiant of the property owners' directive to leave and remain seated at the luncheon counters, as was so demonstrably shown to be the case in **Gober et al.**, now before the court as a companion case (No. 66). But again, this Court is not here concerned with the **wisdom** of the state court's finding, or the **sufficiency of the evidence, Garner**, supra, but with whether it was based upon **any evidence**, as required by the **Thompson case**, supra.

Conceding for the sake of argument alone that the state court might have reached a different conclusion as to the effect of the evidence, certainly there was an abundance of evidence to support its finding as distinguished from the **Thompson** case.

The analogy of these cases by the Alabama Court of Appeals to the sit-down strikes in **National Labor Relations Board v. Fansteel Metallurgical Corporation**, 306 U. S. 240, seems so patently applicable as to warrant no argument from respondent in its support, except to say that nothing that has heretofore been before the courts offers a better parallel. Each attracted great attention to its cause, and each invaded the rights of others.

As to the part played in the sit-downs by Rev. Billups, the record reveals that he went to the school of one of the participants in the sit-downs and carried him to the meeting wherein the sit-downs were discussed (R. 31), and wherein volunteers were solicited to participate in the sit-downs (ibid). It cannot be assumed that he was not part and parcel of the scheme to stage the sit-downs in the absence of some evidence that he recused himself in some fashion. The record reveals that he did not testify and thereby avail himself of an opportunity to negative or otherwise explain his presence and participation in the meeting, as well as his procuring persons to attend the meeting.

Mr. Chief Justice Warren, in the Court's opinion in **Garner v. State of Louisiana**, 82 S. Ct. 248, 253 (1961), stated, "We, of course, are bound by a state's interpretation of its own statute and will not substitute our judgment for that of the state's when it becomes necessary to analyze the **evidence** for the purpose of determining whether that evidence supports the findings of a state court."

While there has been no occasion for the Alabama appellate courts to interpret Section 824 of the City's Code, a very similar state statute, **Section 14 of Title 14, Code of Alabama, 1940**, says in part as follows: "* * * And all persons concerned in the commission of a crime, whether they directly commit the act constituting the offense, **or aid or abet** (emphasis supplied) its commission, though not present, must hereafter be indicted, tried and punished as principals, as in the case of misdemeanors."

The foregoing state statute has been construed by the state courts on many occasions. **Davis v. State**, 36 Ala. App. 573, 62 So. 2d 224, states, "The words 'aid and abet' comprehend all assistance rendered by acts or words of

encouragement or support. * * * **Nor is it necessary to show prearrangement to do the specific wrong complained of.**" (Emphasis supplied.)

In **Pruett v. State**, 33 Ala. App. 491, 35 So. 2d 115, the Court said, "Aid and abet comprehend all assistance rendered by acts or words of encouragement * * *", citing **Jones v. State**, 174 Ala. 53, 57 So. 31, 32.

Alabama has further ruled, "The participation in a crime and the community of purpose of the perpetrators need not be proved by direct or positive testimony, but may be inferred from circumstantial evidence." **Parsons v. State**, 33 Ala. App. 309, 33 So. 2d 164.

While the state statute differs from the city law primarily in the fact that the word "incite" is not found in the state statute, the net effect of the inclusion of the word "incite" in the city law could do no less than enlarge the scope of the city's ordinance beyond that of the state statute.

The salient features of the Alabama decisions, supra, are that **acts or words of encouragement** are sufficient to bring an offender within the scope of the statute; that it is not necessary to show prearrangement to do the **specific wror complained of**; and that the community of purpose may be inferred from **circumstantial evidence**.

Petitioners contend, "Moreover, there is no evidence in this record to sustain a finding that these volunteers did in fact remain on the premises of another after being duly warned not to do so." While your respondent does by no means concede this to be a fact, the argument has no effect upon the question of whether petitioners incited or urged someone to violate a city ordinance. As mentioned earlier, the state statute does not include the word "incite"; consequently, there are no prior Alabama deci

sions on the point. However, it has been many times held that one inciting or soliciting another to commit an offense, even though the solicitation is of no effect and the offense counseled is not committed, is nonetheless guilty. **State v. Bowles**, 70 Kan. 821, 79 P. 726, 69 L. R. A. 176; **State v. Hampton**, 210 N. C. 283, 186 S. E. 251, citing R. C. L.; **Com. v. Randolph**, 146 Pa. 83, 23 A. 388; **State v. Bowers**, 35 S. C. 262, 14 S. E. 488, 15 L. R. A. 199. Many of the decisions declare inciting or soliciting the commission of an offense to be a common law offense. In the instant case, the inciting is specifically punishable by city ordinance. It can hardly be rationally maintained that the offense of inciting another is dependent upon the occurrence of some subsequent event over which the inciter may in fact be incapable of exercising any control. Only his acts can determine his guilt, and not the acts of others at some future date.

B. **Petitioners have not been deprived of constitutionally protected freedom of assembly or speech.**

Petitioners, in addressing this question, lay great emphasis upon the fact that the meeting place for the discussion of the sit-downs was in a home (p. 11). While this line of argument may undoubtedly in many quarters present some emotional appeal, the home offers little cloak of immunity unless the proscribed acts are required by law to be done in a public place. To dwell upon the subject of the utility of the home as a desirable or non-desirable place for the formulation of plans to perpetrate offenses against the public good will serve no useful purpose discernable to the respondent, and since petitioners offer no authority to the contrary, the fact that the offenses charged was committed in one of the petitioners' homes will not be enlarged upon, other than to stipulate same to be true.

This Court, in **Kovacs v. Cooper**, 336 U. S. 77, 88, stated: "To enforce freedom of speech in disregard of the rights of others would be harsh and arbitrary in itself."

In **U. S. v. Peace Information Center**, D. C., D. C. 1951, 97 Fed. Supp. 255, the court stated: "It is an elementary principle, however, that freedom of speech is not absolute and unlimited, but is bounded by the rights of others than the speaker. For example, no one may disseminate obscene matter in the name of freedom of speech. No one is permitted to make a statement that may incite a riot or create a panic. No one may urge or advise the commission of a crime. No one may justify fraudulent or deceptive advertising * * *. Many a crime is committed purely by word of mouth, such as obtaining money by false pretenses, extortion * * *. This list may be multiplied *ad infinitum*."

"The right of free speech is not absolute and this amendment (14th) to the Federal Constitution does not confer the right to persuade others to violate the law." **Bullock v. U. S.**, 265 F. 2d 683, **cert. denied**, 360 U. S. 909, 932.

Petitioners argue they should be permitted to incite a violation of law where same does not "produce a clear and present danger of serious substantive evil that rises far above public inconvenience, annoyance, or unrest" (pp. 11, 12). If the constitutional guaranty afforded one's property does not exceed the criterion of "inconvenience, annoyance, or unrest", as laid down by petitioners, it would appear that private ownership of property is not merely on its way out, but forever gone as one of our most cherished heritages.

It cannot but be of interest to note the frequency with which petitioners voice approval of the constitutional guaranty of freedom of assembly and speech and concur-

rently ignore that provision of the Fourteenth Amendment stating: "Nor shall any state deprive any person of life, liberty **or property** (emphasis supplied) without due process of law." Notwithstanding that the framers of our Constitution thought it appropriate to guarantee **property rights** in the same breath with "**life**" and "**liberty**", petitioners argue that deprivation of property rights does not meet the level of a "substantive evil which the state has the power to prevent" (p. 12).

The case of **Williams v. Howard Johnson**, 268 F. 2d 845, clearly denounces petitioners' parody on the Fourteenth Amendment in affirming that a privately owned restaurant (not involved in interstate commerce) is at liberty to deal only with such persons as it may elect.

**Browder v. Gayle**, 142 F. Supp. 707, further affirms the proposition that one may share his property or business with those whom he may elect unimpaired by the Fourteenth Amendment.

Evidently, court decisions place higher regard upon the rights of property owners than do petitioners, and your respondent respectfully submits that the right of free assembly and free speech does not flood in every direction to the defeasance of the constitutional rights of others.

**C. The ordinance for which petitioners were convicted is not so vague as to be constitutionally vulnerable.**

Petitioners were convicted for a violation of Section 824 of the General City Code of Birmingham of 1944, which reads as follows:

> "Section 824. It shall be unlawful for any person to incite, or aid or abet in the violation of any law or ordinance of the city, or any provision of state law, the violation of which is a misdemeanor."

In discussing the vague character of Section 824, petitioners' sole argument addressed to the question is that the ordinance does not "give fair warning to a defendant of what acts are prohibited" (p. 13). A scant perusal of Section 824 of respondent's code reveals that the aiding or inciting of another **to violate any law or ordinance** of the City is a violation of Section 824. It appears to your respondent that one would have to consciously blind himself to the clear import of the words in the ordinance to lack full and complete understanding of their meaning. Your respondent submits that for the ordinance to be any clearer the entire General City Code would have to be recopied into Section 824, and this might not necessarily lend additional clarification. Respondent submits that the ordinance is neither vague, equivocal or difficult of full understanding, but to the contrary is clear and concise in every detail.

## CONCLUSION.

For the foregoing reasons, the petitioners' convictions by the Alabama courts should be affirmed.

Respectfully submitted,

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600 City Hall Building,
Birmingham, Alabama.

Supreme Court of the United States.

October Term, 1962.

F. L. Shuttlesworth and Charles Billups,
Petitioner,

vs.

City of Birmingham,
Respondent.

No. 67

## CERTIFICATE OF SERVICE.

I, Earl McBee, one of the Attorneys for Respondent, City of Birmingham, and a member of the Bar of The Supreme Court of the United States, hereby certify that on the ..... day of ....., 1962, I served a copy of Respondent's Brief in the above-styled and numbered cause on Jack Greenberg and on Constance Baker Motley, Attorneys for Petitioners, by depositing the same in a United States Post Office or mail box, with air mail postage prepaid, addressed to them at their post office address, namely, 10 Columbus Circle, New York 19, New York, and on the following respective Attorneys of Record for Petitioners, whose addresses are known to Respondent, by depositing the same in a United States Post Office or mail box, with first-class postage prepaid, addressed to Arthur D. Shores, 1527 5th Avenue North, Birmingham, Alabama; Orzell Billingsley, Jr., 1630 4th Avenue North, Birmingham, Alabama; Peter A. Hall, Masonic Temple Building, Birmingham, Alabama; Oscar W. Adams, Jr., 1630 4th Avenue North, Birmingham, Alabama, and J. Richmond Pearson, 415 North 16th Street, Birmingham, Alabama.

EARL McBEE,
Attorney for Respondent.